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PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16, 953

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus

FANT MILLING COMPANY,
Respondent.

To the Honorable, the Judges of the
United States Court of Appeals
for the Fifth Circuit:

The National Labor Relations Board pursuant to the National Labor Relations Act, as amended (61 Stat. 136. 29 U. S. C., Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Fant Milling Company, Sherman, Texas, and its officers, agents, successors and assigns. The proceeding resulting in said order known upon the records of the Board as "Fant Milling Company and American Federation of Grain Millers, AFL-CIO," Case No. 16-CA-752. In support of this petition the Board respectfully shows:

(1) Respondent is a Texas Corporation engaged in business in the State of Texas, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 19, 1957, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, and its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 38 (1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, and its officers, agents, successors and assigns to comply therewith.

(Signed) Stephen Leonard
Stephen Leonard
Associate General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this day of

ORDER TO FILE PETITION

Filed: October 28, 1957

In The United States Court of Appeals
For The Fifth Circuit.

No. 16,953

National Labor Relations Board,
Petitioner,
versus
Fant Milling Company,
Respondent.

A petition for the enforcement of an Order of the National Labor Relations Board made on April 19, 1957, the proceeding known upon the records of the Board as "FANT MILLING COMPANY and AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO, Case No. 16-CA-752", having been presented to this Court;

IT IS ORDERED that said petition be filed and the case docketed as of October 28, 1957; and

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the proceeding before the National Labor Relations Board, in the above entitled matter, within forty days from this date as required by Rule 38, as amended.

(Signed) EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit

DATED:
October 28, 1957

ANSWER OF RESPONDENT

Filed: November 14, 1957

In The United States Court of Appeals
For The Fifth Circuit

No. 16,953

National Labor Relations Board,
Petitioner

versus

Fant Milling Company,
Respondent

To The Honorable, The Chief Judge and
Circuit Judges of The United States
Court of Appeals For The Fifth Circuit:

Fant Milling Company, hereinafter called Respondent, within twenty days after service upon it of petition for enforcement of an order of the National Labor Relations Board, files this its answer to said petition and respectfully shows to the Court:

1. That it admits it is a Texas Corporation engaged in business in the State of Texas within this judicial district and that this court has jurisdiction of the petition as alleged

in Paragraph No. 1 thereof but denies that unfair labor practices referred to in such paragraph at anytime occurred.

2. That it admits the allegations contained in Paragraph No. 2 of the petition except wherein it is alleged that due proceedings were had before the Board in this matter and in this connection Respondent specifically denies that due proceedings were had.

3. That it does not have sufficient information to form a belief as to the truth or falsity of the allegations contained in Paragraph No. 3 of the petition, ~~by reason~~ of which such allegations are neither admitted nor denied.

4. That the complaint upon which the hearing before the Board was had was improperly issued, it having been issued to the prejudice of Respondent in violation of the Administration Procedure Act and contrary to the Board's announced statements of procedure. Thereby, such complaint and the hearing had thereon, each and both, are void and voidable.

5. That the findings of the Trial Examiner adopted by the Board to the effect that Respondent violated Section 8 (a) (5) of the National Labor Relations Act by having unilaterally granted a wage increase is not supported by, nor encompassed within, the charge filed herein and upon which the complaint issued. Therefore, the Petitioner does not and did not have jurisdiction of any such alleged violation of the National Labor Relations Act, if such occurred, which Respondent specifically denies.

6. That the findings of the Trial Examiner adopted by the Board and upon which the Board bases its order to the effect that Respondent violated the National Labor Relations Act by unilaterally granting a wage increase is not supported by any substantial evidence and is contrary to the great weight of the evidence.

7. That the findings of the Trial Examiner adopted by the Board to the effect that Respondent on or about November 21, 1953, and at all times thereafter, failed and refused to bargain in good faith in violation of Section 8 (a) (5) and (1) of the National Labor Relations Act, is not supported by any substantial evidence and is contrary to the great weight of the evidence.

8. That each and all of the findings of the Trial Examiner adopted by the Board and on which the Board bases its order are not supported by any substantial evidence of probative force but are contrary to the great weight of the evidence and to the law.

9. That there was not adduced in the hearing any substantial evidence showing a violation of Section 8 (a) (5) and (1) of the National Labor Relations Act by Respondent, its officers or agents, and that there exists no basis in fact or law for the enforcement of the order sought to be enforced. Enforcement of the order would not accomplish the purpose of the National Labor Relations Act designed and intended to promote industrial peace and harmony between employers and employees but would be contrary to such purpose.

10. That, in any event, the notice required to be posted by the Petitioner's order, for which enforcement is here sought, enlarges upon and is different from the notice required to be posted by the order of the Trial Examiner, which action of the Board is unauthorized inasmuch as no objection to the language of the notice required to be posted by the Trial Examiner's recommendation was taken by any party and such action constitutes an unauthorized action on the part of Petitioner. The notice which Petitioner ordered Respondent to post, and now seeks enforcement, is too broad in its scope and too vague and indefinite to warrant enforcement.

WHEREFORE, Respondent prays that said petition be in all things denied.

GILLESPIE, GILLESPIE
& ROBINSON
215 M. & P. Bank Building
Sherman, Texas

FISHER, McLAUGHLIN
& HARRISON
Liberty National Bank Building
Paris, Texas

ATTORNEYS FOR
RESPONDENT

/s/ J. D. McLAUGHLIN
Of Counsel

CERTIFICATE OF SERVICE.

The undersigned certifies that a copy of the foregoing answer was this day served by air mail on Stephen Leonard, Esquire, Associate General Counsel, National Labor Relations Board, Washington D. C.

Dated at Paris, Texas, this November 13th, 1957.

(Signed) J. D. McLAUGHLIN
Of Counsel for Respondent

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
For The Fifth Circuit

No. 16,953

National Labor Relations Board,
Petitioner,

versus

Fant Milling Company,
Respondent.

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and

Regulations of the National Labor Relations Board — Series 6, as amended, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board, entitled "Fant Milling Company and American Federation of Grain Millers, AFL-CIO", Case No. 16-CA-752 before said Board, such transcript includes the pleadings and testimony and evidence upon which the Order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

VOLUME I	*CERTIFIED RECORD*
Stenographic transcript of testimony taken before Trial Examiner Arthur E. Reyman of September 20, 21, 22, 23, 26, 27, November 15, 30, and December 1, 1955	1 - 561
VOLUME II — Pleadings[1]	
1. Charge filed by Ralph Cox in behalf of American Federation of Grain Millers, AFL on May 20, 1954.	1
2. Affidavit of service mailed May 20, 1954, together with United States Post Office return receipt thereof	1 - 2
3. Copy of letter dated July 13, 1954, addressed to the Union from Regional Director refusing	

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[1] Items 1 thru 10 were marked General Counsel's Exhibits No. 1-A thru 1-J in the proceeding before the Board.

to issue complaint, together with United States Post Office return receipt thereof 1 - 2

4. Union's request for review dated July 31, 1954 1 - 42

5. Copy of letter dated January 24, 1955 addressed to the Union from Regional Director withdrawing the refusal to issue complaint, together with United States Post Office return receipt thereof 1 - 2

6. Copy of letter dated August 12, 1955, addressed to the Union's Counsel, sustaining the Regional Director's ruling in refusing to issue the complaint 1

7. Notice of hearing, complaint issued by the Regional Director on August 17, 1955 1 - 5

8. Affidavit of service of the notice of hearing, complaint mailed August 17, 1955, together with United States Post Office return receipt thereof 1 - 2

9. Respondent's motion to dismiss motion to strike and original answer subject to such motions 1 - 6

10. Order on motion to dismiss, and motion to strike dated September 2, 1955 and signed Alba B. Martin, Trial Examiner 1

11. Affidavit of service of order on motion to dismiss and motion to strike mailed September 2, 1955 . . . . 1 - 2

12. Copy of Trial Examiner's Reyman's letter dated October 31, 1955, to all parties stating that on September 27, 1955, the hearing in the above case was adjourned sine die so that opportunity could be afforded counsel for each of the parties to examine the stenographic transcripts of meetings between the parties. Trial Examiner Reyman requests that he be notified no later than November 7, 1955, whether a resumption of the hearing should be had . . . . 1 - 4

13. Copy of Trial Examiner's telegram dated November 10, 1955 to all parties, stating that order reopening hearing would be November, 15, 1955 1

14. Order to resume hearing issued by Trial Examiner Reyman on November 10, 1955 1

15. Copy of Trial Examiner's Intermediate Report and recommended Order dated March 15, 1956 (annexed to item 19 hereof.) . . . . 1 - 21

16. Copy of order transferring case to the National Labor Relations Board dated March 15, 1956 . 1 - 3

17. Respondent's exceptions and objections to the Intermediate Report and Recommended Order, record and pleadings received April 30, 1956 . 1 - 12

18. Respondent's request for permission to present oral argument received April 30, 1956. (Denied See page 117 footnote 1 of Decision and Order) .... 1 - 2

19. Copy of Decision and Order issued by the National Labor Relations Board on April 19, 1957, with Intermediate Report and Recommended Order attached .... 1 - 15

VOLUME III — Exhibits introduced in evidence at the hearing, also rejected exhibits.

[*] GENERAL COUNSEL'S EXHIBIT NO.

2. Copy of letter dated August 2, 1953 addressed to Fred Honea, Secretary of the Fant Milling Company from Roy O. Wellborn, Vice President of the Union requesting a meeting ~~to be~~ held on August 13, 1953.

3. Agreement of Fant Milling Company and American Federation of Grain Millers.

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[*] Other than those enumerated in Volume II, *supra*

4. Letter dated August 24, 1953 on letter head of the Fant Milling Company addressed to Roy O. Wellborn and Signed Fred Honea, suggesting a change in date for the next meeting.

5. Hand written five page document written on yellow lined paper dated September 5, 1953 purporting to be notes of negotiations with the Fant Milling Company.

6. Letter dated September 17, 1953 written on letter head of the law offices of Gillespie and Gillespie addressed to Roy O. Wellborn and signed by C. H. Gillespie, Jr., requesting a meeting to be held on September 26, to continue contract negotiations.

7. Copy of letter dated September 20, 1953 addressed to C. H. Gillespie Jr., and signed by Roy O. Wellborn acknowledging letter of September 17, 1953.

8. A three page document written on yellow lined paper, purporting to be minutes of negotiations with Fant Milling Company on Saturday 26, 7:30 P. M.

9. Copy of letter dated November 3, 1953 addressed to C. H. Gillespie Jr., and bearing a typewritten signature Ralph Cox District Representative requesting a meeting to continue negotiations on the contract with the Fant Milling Company.

10. Typewritten four page contract with heading of Fant Milling Company Contract with Employees.

11. Rejected

12. Slip of paper entitled "Work Week".

13. Slip of paper entitled "Truck Drivers".

14. Slip of paper entitled "Limitation on Strike and Lockouts".

15. Slip of paper entitled "Management".

16. Nine page document headed "Fant Milling Company Contract with Employees".

17. Document headed "Article 5 Wages".

18. Addendum to Company proposal, entitled "Article 14, Reporting and call-back pay".

19. Addendum to Company proposal entitled "Article 15, Truck Drivers Reporting and Reporting Pay".

20. Document entitled "Article 7 Seniority".

21. Document entitled "Article 5 Wages".

22. Document consisting of three typewritten pages entitled "Grievance Procedure".

23. Document consisting of two pages entitled "Seniority".

24. Document consisting of two pages entitled "Seniority".

25. Typewritten paragraph entitled "Joint Proposal".

26. Copy of letter dated September 7, 1954 addressed to Gillespie and Gillespie bearing typewritten signature of Roy O. Wellborn, concerning a redraft of the grievance procedure.

27. Document headed "Grievances".

28. Copy of letter dated November 23, 1954 addressed to Roy O. Wellborn bearing typewritten signature of C. H. Gillespie Jr., concerning, continuing refusal to bargain with the Union.

UNION'S Exhibit No.

1. Rejected.

RESPONDENT'S EXHIBITS NO.

1. A, B and C identified only

2 thru 20. Transcripts of negotiation sessions, marked Volume IV of the certified record.

21. Document dated November 19, 1954, headed "To Our Employees," and signed Jas. A. Fant, President, concerning refusal to bargain with the Union.

22. Document dated October 6, 1954, headed "Pay Bulletin" and signed by Jas. A. Fant, President and Ben Blackburn, Superintendent.

REJECTED EXHIBITS:

General Counsel's Exhibit No. 11, Document consisting of four pages on yellow lined paper entitled "Negotiations with Fant Milling Company, Thursday, November 12, 1953".

Union's Exhibit No. 1, Copy of a message which the respondent Company distributed to the employees within the collective bargaining unit on or about June 18, 1953.

IN TESTIMONY WHEREOF the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this
day of

(Signed) Frank M. Kleiler
Frank M. Kleiler
Executive Secretary

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

CHARGE AGAINST EMPLOYER

United States of America
National Labor Relations Board

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS. — File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
16-CA-752

Date Filed
May 20, 1954

Compliance Status Checked By:
ER

1. Employer Against Whom Charge Is Brought
Name of Employer
FANT MILLING COMPANY (Fred Honea, Secy.)

Address of Establishment (Street and number, city, zone, and State)

408 E. King
Sherman, Texas

Number of Workers Employed

200

Type of Establishment (Factory, mine, wholesaler, etc.)

Miller

Identify principal product or service

Flour and feeds

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (5) of the National
(List subsections)
Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about November 20, 1953, it, by its officers, agents and employees, refused to bargain collectively with the authorized agents of American Federation of Grain Millers, AFL, chosen by a majority of its employees at its plant to represent them for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about the dates set opposite their respective names below, it, by its officers, agents and employees, terminated the employment of:

Tony Polk	April 23, 1954
Clyde Gordon	April 23, 1954
W. M. Morris	April 24, 1954
Onnie Ray	April 24, 1954

because of their membership and activities in behalf of American Federation of Grain Millers, AFL, a labor organization, and at all times since such dates it has refused and does now refuse to employ the above named employees.

By the acts set forth in the paragraphs above, and by other acts and conduct, it, by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
   American Federation of Grain Millers, AFL (no local)

4. Address (Street and number, city, zone, and State)
   619 E. Maple, Enid, Oklahoma

Telephone No.
4336

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Address of National or International, if any (Street and number, city, zone, and State)

Telephone No.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signed) By RALPH COX
(Signature of representative or person filing charge)
Ralph Cox
International Representative
(Title, if any)

May 20, 1954
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

United States of America
Before The National Labor Relations Board

In the matter of

Fant Milling Company
and Case No. 16-CA-752
American Federation of Grain Millers, AFL

AFFIDAVIT OF SERVICE OF Copy of Charge

DATE OF MAILING May 20, 1954

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered mail upon the following persons, addressed to them at the following addresses:

Mr. Fred Honea, Secretary
Fant Milling Company
408 E. King
Sherman, Texas

(Signed) EVERETT P. RHES

Subscribed and sworn to before me
this 21st day of May, 1954

/s/ LURLINE PHILBECK
Designated Agent.
NATIONAL LABOR
RELATIONS BOARD

Form 3811
Rev. 1-52

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this Card.

1 /s/ FRED HONEA
(Signature or name of addressee)
2 /s/ THOMAS BEALL
(Signature of addressee's agent — Agent should enter addressee's name on line ONE above)

Date of delivery May 21, 1954

(SEAL)

National Labor Relations Board
Sixteenth Region
Room 2093,
300 West Vickery
Fort Worth 2, Texas

July 13, 1954

Mr. Ralph Cox, Int'l. Repr.
American Federation of Grain Millers, AFL
610 E. Maple
Enid, Oklahoma

Re: Fant Milling Company
Case No. 16-CA-752

My dear Mr. Cox:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully considered.

As a result of our consideration it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time, and I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations you may obtain a review of this action by filing a request for such a review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Sincerely

Edwin A. Elliott
Regional Director

REGISTERED
RETURN RECEIPT REQUESTED

cc: General Counsel, NLRB, Washington 25, D. C.

Mr. O. B. Fisher, Liberty National Bank Bldg.,
Paris, Texas

Fant Milling Company, Attn: Fred Honea, Sec.,
408 E. King, Sherman, Texas

Mr. Campbell Gillespie, Gillespie & Gillespie,
210 M & P Bank Bldg., Sherman, Texas

(Return Receipt Omitted)

UNION'S REQUEST FOR REVIEW

(Number and Title Omitted)

Comes now American Federation of Grain Millers A.F.L., hereinafter Union, and pursuant to Sec. 102.1 Rules and Regulations, and the extension of time unti August 2, 1954, granted July 22, 1954, timely files this Request for Review of the action of Edwin A. Elliott, Regiona Director, 16th Region, in refusing to issue complaint in th above styled and numbered matter, and as cause why suc action should be reviewed and reversed, says:

I

The Regional Director erred in his conclusion that " does not appear that there is sufficient evidence of violations to warrant further proceedings at this time" wit respect to the portion of the charge alleging a violation o Section 8 (a) (5).

Statement of Facts

After a Board-ordered election on June 19, 1953, whic the Union won by a score of 94 to 85, the Regional Directo on June 26, 1953, certified the Union as the collective bargaining representative for employees in the unit foun appropriate by the Board.

Thereafter, on August 2, 1953, the Union wrote the Secretary of the Employer, requesting a bargaining conferenc for August 13, 1953, to be held either at the Company offic or in a local hotel; on August 6, 1953, Employer, through its Secretary, agreed to the date and set the time at 9:00 A. M.

The Union was represented by its Vice President and a committee of employees; the Company by its Secretary, Mr. Honea and a Mr. Martin. The Union presented its contract proposal which contained a paragraph 50 "Departments, Classifications and Rates of Pay" but no provisions thereunder, since the Union did not have sufficient information to make a proposal relating to these matters. The Union pointed out its lack of information as to these matters and requested a list of classifications, departments and rates of pay. The Company gave the Union a list, stating that it was not a complete list but was a start toward getting the jobs classified. The Union then asked for a seniority list of employees and the Company stated that it did not have any record of the number of the older employees and it would be impossible to get a true seniority list from their records. The discussion in this meeting was of a general nature and it was agreed at the close of the meeting that the parties would again meet on August 27, 1954, the lapse of time being at the request of the Company which wanted a few days to discuss the Union's proposal and it's Secretary wanted to take a week's vacation.

On August 24, 1953, the Company's Secretary wrote to Union's Vice President, stating that the Company Attorney has been on vacation and has not yet been able to discuss the Union's proposal and until such discussion was had another bargaining session "would not be of very much use." The Secretary suggested that the date of August 27, 1953 be advanced until September 3, 1953. The Union agreed to this proposal and then on September 1, 1953, the Company representative, Martin, called Vice President Welborn to request that the meeting again be postponed from September 3 to Saturday, September 5, 1953, asking that the meeting place be in the offices of their attorneys, and that the time be 7:00 P. M. Expressing its basic disagreement with the place and time of the meeting, the Union, nevertheless, agreed to meet as requested by the Company.

At the September 5, 1953 meeting the Union was represented by its Vice President and a Committee of employees and the Company was represented by Martin and its attorney, Gillespie. Also present was a court reporter to record the discussion. The Company attorney opened the meeting by making a statement regarding the court reporter, saying the Company had retained the reporter to take a recording of forthcoming contract discussions and that the Union could make its own arrangements with the reporter to furnish copies of the transcript to the Union. Union spokesman Welborn said that the Union's position was a preference not to have a reporter present, but if the Company wanted one, it had no objections. Attorney Gillespie then asked for a summary of what had transpired up to date, explaining that he had not been in on any previous meetings. Union Vice President, Welborn reviewed the discussions of August 13, 1953 and then suggested that the parties base their discussion upon the the Union's proposal.

Concerning paragraph 1 of Union proposal, the Company wanted to exclude Local Union No. 64 as a party to the contract. The Union agreed to word this paragraph so that there would be no question about the contract applying only to the employees of the Company.

Concerning paragraph 2 of the Union's proposal, the Company wanted to rewrite the language and the Union stated that it did not believe a rewriting was necessary, but that if the Company wanted to submit something, the Union would consider it.

Concerning paragraph 3, the Company asked to exclude specifically the classification of watchman, to which the Union agreed. Then the Company questioned the Union's language relating to trainees and the Union said that if the Company desired that language could be deleted.

Concerning paragraph 4, the Union said that it did not make much difference at this time whether the check-off was in the contract or not; the Company said that if it accepted the check-off it would not want to make it irrevocable.

Concerning paragraph 5, the Company objected to the last sentence in this clause, relating to the definition of a normal work week being 40 hours, consisting of 5 consecutive days of 8 hours each, normally Monday through Friday.

Concerning paragraph 6, the parties agreed to it after striking all after the second line, beginning with the word "except."

Concerning paragraph 7, the Company would not agree to paying daily overtime in excess of 8 hours.

Concerning paragraph 8, the Company did not agree to a "no staggered work week" and objected to paying time and one-half on Saturday, after paying for a holiday during the week.

Concerning paragraph 9, it was passed when the Company stated that it was now paying 5c and 8c shift differentials.

Concerning paragraph 10, the Company objected to paying double time for Sunday work, stating that it was not now paying time and one-half for such work.

Concerning paragraph 11, the Company agreed to six paid holidays, but requested a substitute holiday for Memorial Day. The Union agreed that the Company could substitute such other day.

Concerning paragraphs 12, 13 and 14, they were discussed in a general way, but no agreement was reached.

At the point the Company asked to adjourn the meeting until they notified the Union that they were ready to meet again. Welborn objected to meeting on Saturday night for only two hours, and asked the Company to meet on successive nights, which request the Company refused saying that two-hour meetings were long enough and that it could not meet on successive nights and it could not meet every week, but it would let the Union know when it could meet. No date was set for the next meeting, and the September 5, 1953 meeting was then adjourned.

On September 17, 1953, the Employer's attorney, Gillespie, wrote Vice President Wellborn, saying that there had been some discussion with Company management relating to "the features covered in the meeting with you on September 5" and that they "believe that we can be ready for further negotiations with you on September 26." Mr. Gillespie suggested a meeting in his office at 7:30 P. M. on September 26, 1953, which was a Saturday. By a letter dated September 20, 1953, Vice President Wellborn agreed to the suggested time and date, but pointed out as follows:

> "Although it is very inconvenient for us to meet at night and especially so on Saturday night, either myself or my assistant, Mr. Ralph Cox will be available for this meeting. We trust that further meetings can be arranged for the mutual convenience of all parties concerned."

At the meeting on Saturday, September 26, 1953, at 7:30 P. M., in the attorney's office, the Union was represented by Representative Cox and the Employees' committee; the Company by attorney Gillespie, Secretary Honea, Mr. Martin and another attorney from Paris, Texas, O. B. Fisher. At the outset, Gillespie stated that the Company had gone over the proposals previously discussed and had not changed its position since the last meeting on such matters as time and one-half after 8 hours, and other premium pay. In addition, he stated that the Company could not agree to paragraph 14, which related to crediting holiday time not worked but paid in computing overtime pay.

Concerning paragraph 13, the Company stated that it could probably agree to this paragraph if it were modified to provide variations for truck drivers.

Concerning paragraph 16, the Company did not agree.

Concerning paragraph 17, the Company did not agree.

Concerning paragraph 18, the Company stated that it was the duty of each person to serve on the jury and the Company did not feel that they should pay the difference. The Company "will not agree to this paragraph."

Concerning paragraphs 19, 20, 21, 22, 23, 24, 25 and 26, the Company desired further clarification. The Company said it wanted to be the sole judge as to who was promoted and Union Representative Cox said that it could not agree to this position.

Concerning paragraph 27, 28 and 29, the Company wanted more time to study.

Concerning paragraph 30, the Company said that there was not too much disagreement and that it would give the information on request by the Union, but wanted to discuss this paragraph further.

Then Company Attorney Gillespie asked for adjournment. Union Representative Cox asked Gillespie to meet Monday, September 28, 1953 and Mr. Gillespie said that he could not meet Monday, and would go over the contractual provisions with the Company and get in touch with the Union for the next meeting, Union Representative Cox asked Gillespie to arrange the next meeting through the week and to spend more time negotiating. Whereupon the meeting adjourned at 9:30 P. M.

On November 3, 1953, Union Representaive Cox, wrote Mr. Gillespie that he had understood in the meeting of September 26, 1953 that Gillespie would contact Cox for another meeting; and stated that since he had not heard from Gillespie, he was requesting that a meeting be set to continue negotiations.

The next conference was held Thursday, November 12, 1953, in which the Union was represented by Representative Cox and the Employees' committee; the Company by Attorneys Gillespie and Fisher and Mr. Martin. Union Representative Cox suggested that negotiations continue from that point in the contract which was under discussion at the last meeting.

Concerning paragraph 31, the Company stated that it did not wish to put any vacation plan in the contract, as its operations change from time to time; but the Company did not want to refuse the vacation plan, but took the position that the plan should be left up to the Company in the exercise of its discretion.

Concerning paragraph 32, there was not too much disagreement, but it was not agreed to.

Concerning paragraph 33, the Company stated that it would not agree at this time.

Concerning paragraph 34 and 35, the Company agreed.

Concerning paragraph 36 and 37, the Company did not object.

Concerning paragraph 38, the Company agreed.

Concerning paragraph 39, the Company did not see too much therein to disagree with, but Gillespie again stated that the Company does not want to put a definite vacation plan in the contract.

Concerning paragraph 40, the Company did not agree to the grievance procedure and does not want an outsider coming in to arbitrate grievances. Gillespie stated that the final settlement should be left to the Company officials.

Concerning paragraphs 42, 43, 44 and 45, the Company "will not agree to these paragraphs." The Union agreed to submit a clause setting out how its arbitration board is set up.

Concerning paragraph 48, the Company stated that they did not think such paragraph necessary to be put in the contract but would not object to it.

Concerning paragraph 49, the Company indicated that the parties would be able to work this out.

Concerning paragraph 50, the Company said that it was not in a position to agree or disagree to this clause, but if other provisions of the contract were agreed to, this clause would not stand in the way of a settlement.

Concerning paragraph 51, "Terms of Agreement" the Company stated that there would not be too much trouble on this paragraph if an agreement were reached on other issues.

Concerning paragraph 52, the Company had no objections.

Then the Union asked the Company if it would go back to the beginning of the proposed contract to see what agreements had been reached and Gillespie stated that the Company's proposal was their answer at this time, but there may be some additions by both Company and Union. Gillespie stated that the Company would insist on a no-strike and lockout clause. Cox asked Gillespie to set up a series of meetings to negotiate and settle the contract and Gillespie suggested that the parties correspond on some of the remaining issues. The Company Representative, Martin asked the Union to send him a list of the proposed classifications, and the Union indicated that it would. The next meeting was tentatively set for Wednesday, December 2, 1953, and the November 12, 1953 meeting was adjourned at 10:00 P.M.

On December 1, 1953, at 4:00 P.M., the Company Attorney Fisher, who lives in Paris, Texas, some 64 miles from Sherman, Texas, called Representative Cox asking that the meeting originally set for December 2, 1953 be cancelled as Attorney Gillespie was sick in bed and Fisher did not want to meet with only himself and the Company committee, asking for a meeting on December 9, 1953. Fisher stated that he didn't feel that the parties could accomplish anything without Gillespie present and further, that the court reporter was sick. Cox agreed to the postponement as suggested by Fisher.

On December 9, 1953, at 7:30 P.M. the parties met the Union represented by Representative Cox and the negotiating committee, and the Company by Attorneys Gillespie, Fisher, Company Secretary Honea and Mr. Martin. At this meeting the discussion began with the Company's proposal and Cox said the Union could not agree to the Company's proposed recognition clause, since it was not explicit enough and Gillespie stated that the Company only wanted to put in this clause what the certification calls for. Cox insisted that the parties spell out what the bargaining issues were and the unit.

Concerning Article II, Cox stated that there was not too much objection to a clause of this type.

Concerning Article III, the Union said it could not agree to the subparagraphs, but would be willing to work out some type of no-strike clause.

Concerning Article IV, the Union could not agree to it as written.

Concerning Article V, the Union said it could not agree because wages were a bargaining issue, to which Gillespie stated that the Company wanted the right to raise wages as it saw fit.

Concerning Article VI, the Union said that it desired time and one-half after 8 hours in one day, and that the clause was all right insofar as it went, but that it didn't go far enough.

Concerning Article VII, Section 1, the Union said it could not agree as written because it gives the Company the right to choose the man they will promote and lay off, to which the Company replied that it wanted the right to choose who they would promote or lay off, and were not recognizing seniority.

Concerning Sections 3 and 4, the Union did not object. Cox suggested that the parties could take the Company proposal on seniority and the Union proposal and try to work out a satisfactory seniority provision.

Concerning Article VIII, the Company said it was opposed to any arbitration procedure at this time, but was not saying that company policy could not be changed.

Concerning Article X the Union desired to have and maintain a bulletin board at each of the time clocks and this request, along with the rest of the clause as written, was agreed to.

Representative Cox asked for a meeting on Thursday, December 10, 1953, but Company Attorney Fisher said that he did not think that anything could be accomplished by meeting the following night, and Gillespie stated that they would have to have the wages and classifications before they could proceed with negotiations. Cox asked for a January 6, 1954 meeting and Fisher said he could not meet on that date. Cox asked for a January 8, 1954 meeting and this date was agreed to. The meeting adjourned at 10:20 P. M.

The next meeting was held on Friday, January 8, 1954 at 7:30 P.M.; representing the Union were Vice President Wellborn, Representative Cox and the Employee Committee; for the Company were Attorneys Gillespie, Fisher, Company Secretary Honea and Mr. Martin. At the outset, Gillespie stated that the Company was ready to sign its proposed contract. Wellborn said that he thought that the Company surely wanted a contract that was fair to the employees and pointed out that seniority was of first importance to the employees and that qualifications and classifications were second. Gillespie stated that the Company wanted to be the sole judge of who was best qualified and that the Company wanted the right to select the junior employee if he is better qualified than the senior man. Wellborn said that if the Company would consider seniority first and qualifications second, he would not object to adding a paragraph whereby the Company would act upon two employees having the same seniority on the basis of the number of dependents. Gillespie said that if the Union would turn the first two factors around that it would drop the third. The discussion then turned to the Union's vacation proposal and it was learned that the Company now pays one week, based upon 40 hours, after a year, but Gillespie said that the Company did not want to put the vacation plan in the contract and that he hoped that the Company could continue to pay the one week. Concerning the Union's request for three weeks after 10 years, Gillespie stated the Company could not agree to it, and further that he thought two weeks after 2 years was too close to the 1 year vacation factor. Gillespie said that he would want to check with the management of the Company before agreeing to two weeks vacation and would see how far the Company could go on vacations.

Concerning the Management Prerogative clause in the Company's proposal, Wellborn stated that he could not agree to the Company proposal as written, and would want to study it and re-draft a shorter clause.

At this meeting agreement was reached, based upon the Company's proposal, to the preamble, Article I, when the Company agreed to include the language of the Board's certification, Article II, and the "purpose" clause of Article III. The remainder of Article III was not agreed to and Wellborn indicated that he would write a no-strike clause and no lockout for the Company's consideration. Gillespie stated that the Company wanted a damage clause in the contract.

Then the discussion continued on the Union's proposals and concerning paragraph 5, the Company said that it did not want to agree to the 7:00 o'clock starting time; concerning paragraph 6, time and one-half after 40 hours was agreed to; concerning paragraph 7, Gillespie said that he would think more on this and could not agree to it at this time; concerning paragraph 8, Gillespie said the Company did not propose to make a practice of staggering work of employees, but there might be times when the Company would have to do so, and therefore the Company did not agree to this paragraph; concerning paragraph 9, the Company said that it presently paid differentials of 5c and 8c but Gillespie did not want to put differentials in the contract and would not agree to do so; concerning paragraph 10, the Company would not agree; concerning paragraph

11, the Company substituted San Jacinto Day for Memorial Day and agreed to pay straight time not worked and double time if worked; concerning truck drivers, Union Vice President Wellborn stated he would write a clause to cover the truck drivers.

Wellborn then asked for a meeting on January 20 and 21, 1954 and Gillespie objected to two meetings in a row so the next meeting was set for January 21, 1954 and the meeting of January 8, 1954 was adjourned at 10:45 P.M.

The scheduled January 21, 1954 meeting was not held because of adverse weather conditions making it difficult for all parties to get to Sherman. During the telephone conversation in which this was agreed, Union Representative Cox requested a meeting on Tuesday or Wednesday, January 26 or 27 and Gillespie said that he would advise. Later the same day, Gillespie said that they could not meet on either of those days because Attorney Fisher had to be out of town, and Gillespie asked for a meeting on Friday, January 29, 1954 at 7:30 P.M., to which Cox agreed.

The meeting of Friday, January 29, 1954, at 7:40 P.M. was held; the Union represented by Vice President Wellborn and Representative Cox and the Employees Committee; the Company by Attorneys Gillespie and Fisher, Secretary Honea and Mr. Martin. Gillespie stated that the Company had not come to any conclusion on the vacation proposal but did not think vacations would stand in the way of an agreement. Concerning other matters, the Union presented its modified proposal relating to the work week, which was rejected by the Company, saying that Attorney Fisher would rewrite the first paragraph thereof and add to the second paragraph no hourly guarantee; relating to the truck drivers clause, the Company would consider it; relating to daily overtime after 8 hours, the Company would not agree; relating to paragraph 8 of the Union's proposal, the Company said it was not its practice to stagger the work week, but did not wish to write it in the contract, to which the Union stated that it desired to have the clause in the contract; concerning shift differentials, the Company's present practice was 5c and 8c; the Union's proposal 6c and 8c, Gillespie said that the Company was not willing to agree to the Union's proposal, but would not let it stand in the way of agreement; relating to the no-strike or lockout clause presented by the Union, the Company said the clause did not go far enough and it wanted damages in case of illegal strike, so no agreement was reached on this clause; relating to the management clause presented by the Union, Gillespie stated the Company could not agree to it. The Company agreed to start getting a seniority list of employees prepared and the meeting adjourned at 10:15 P.M. on Friday, January 29, 1954.

No further meetings were held until April 2, 1954, at which time Federal Mediation and Conciliation Commissioner, Morrow, presided, having been requested to arrange a meeting as early as March 15, 1954. The Union's notes on this meeting have been displaced, but no agreements of any significance were reached.

The next meeting was held April 8, 1954, having been set at 10:00 A.M. but was delayed until 10:30 A.M. pending the arrival of the Secretary Honea and Mr. Martin. For the Union, were Representative Cox and the Union Committee;

for the Company, Attorneys Gillespie and Fisher, Secretary Honea and Mr. Martin; Commissioner Morrow presided. The Company presented the Union with a new counter-proposal and Gillespie went through the proposal and explained it. Then Cox asked for a recess, at 11:20 A.M., so that the Union could study the Company's proposal. The parties met at 1:30 P.M. and Cox replied to the Company's proposal as follows: Articles I, II, and III, except Sections A, B, C, and D, agreed; Article IV, the Union asked the Company to add a sentence prohibiting the staggering of work as to avoid overtime and to add daily overtime after 8 hours, to which Gillespie replied that it was not the Company's intention to stagger the hours, but it would not put it into the contract and would not agree to pay daily overtime after 8 hours; Article V, the Union could not agree to give the Company the right to raise or lower wages since it was a bargainable matter, to which Gillespie replied that the Company would have to have that right; Article VI, the Union could not agree; Article VII, the Union could not agree to the action of the Company being final and reiterated its desire to have an arbitration procedure, to which Attorney Fisher said that the Company would not agree to arbitration and Attorney Gillespie said that if the Union did not agree to the Company's final decision, instead of arbitration, it would be a matter for the courts to decide, to which Cox replied that the Union did not wish to have to go to court to settle grievances and instead desired an arbitration procedure; Article VIII, holidays, the Union asked the Company to include in the holiday provision that the employee would receive straight time pay if not worked, and double time if worked and that holiday pay would not disqualify the employee from overtime he normally would receive, to which Gillespie said they would not put this provision in the contract and that they had not agreed to pay the holiday pay, to which Cox called the Company's attention to the meeting of January 8, 1954 in which the Company agreed to the holiday pay, to which Honea and Gillespie stated that the Company had not agreed to any such provisions; Article IX was agreed to; Article X, the Union desired to study this clause further, thinking that it could be made much shorter; Article XI, the Union stated that such a clause was not needed; Article XII, not agreed to; Article XIII, not agreed to. Representative Cox then proposed that the Company agree to one week's vacation after one year, two weeks after two years, and three weeks after ten years; to shift differential of 6c and 8c and the call-in clause after completion of day's work and reporting-in clauses, as proposed in the Union contract; Gillespie replied that the Company would not agree to put holiday pay, vacation pay, and shift differential pay in the contract, saying that the Company would not contract to pay these items, since the Company wanted the right to pay or not to pay them; Cox replied that the Union wanted the provisions in the contract, and could not agree to leave them out. Then there was some discussion about the classifications as set forth in the Company's proposal, after which Representative Cox asked the Company to give serious consideration to the wage adjustments in the feed mill as there seemed to be too many classifications on the same rate of $1.36. Concerning this adjustment, Cox asked for consideration so that it could be discussed in the next meeting. Gillespie said that he could see some need to look into this matter and that they would give it some consideration. Cox asked the Commissioner to set a meeting for the next day, April 9, 1954, but the Company declined, saying that Fisher could not be present and that they would not meet. Commissioner Morrow asked for a meeting on April 21, 1954 and the Company refused, saying that it would meet on April 22, 1954 at 10:30 A.M., therefore, the next meeting was set for that date. The meeting adjourned at 3:45 P.M. because Fisher said he had to return to Paris.

On April 19, 1954, the Company put into effect, certain wage adjustments which had been the subject of Cox' request for consideration in the April 8, 1954 meeting. These adjustments covered the classifications of grinders, packers, sowers, truckers, grain handlers, batch mixer operators, and pellet mixer operators. No notice of this adjustment was given to the Union prior to its effective date.

As scheduled, the next meeting was on Thursday, April 22, 1954 at 10:30 P.M. The Union was represented by Representative Cox and the Employee Committee; the Company by Attorneys Gillespie, Fisher, Secretary Honea and Mr. Martin; at the outset, Commissioner Morrow called to say that he could not be present at the meeting because of a strike situation in Dallas, Texas. Gillespie presented the Union with a Company proposal on wages and classifications with the following adjustments in the feed mill:

Grinders, 2c
Packers, sowers, truckers, 3c
Grain handlers, 5c
Batch mixer operators, 5c
Pellet machine operators, 5c

Concerning these classifications in the feed mill, Cox inquired if the oiler did not have more responsibility so as to entitle him to an adjustment, to which Gillespie replied that the Company did not agree. The Union did not agree to the first paragraph of the Company's proposal on wages, saying that it would give the Company the right to raise wages of any and all employees as the Company saw fit; Gillespie replied that the Company wanted this right so as to grant merit increases to the employees who, in the Company's opinion, were doing a good job, and that the Company had to have the right to decrease wages at its option if it was necessary to meet competition, to which Cox replied that the Union could not agree to the clause and Gillespie said the Company would rewrite the clause and submit it at the next meeting. Other matters discussed at this meeting included the Company's proposal for a 60 day probationary period, the Union desiring 30 days, to which Gillespie said that the Company would have to have 60 days; the Company's proposal on wages which the Union said it would study, along with the classifications, further; the Company' proposal on seniority, which the Union said it could not agree since it wanted protection for senior men and for the principle of seniority, to which Gillespie said that the Company did not agree to the Union's proposal on seniority and it would rewrite its seniority clause and present it at the next meeting. At about this point, Cox stated that the Union wanted to cooperate with the Company and the Company had stated in past meetings that it wanted to be fair to the employees and treat them as other companies treat their employees, that the Company knew what the employees were entitled to have in the contract, and that it was time the Company showed they wanted to be fair and put in the contract those items on which the parties could and had reached agreement, to which no reply was made by the Company. Concerning arbitration, the Union asked the Company if it had changed its position on the arbitration clause, and Gillespie replied that the Company would not agree to arbitration. Cox said that if the Company would leave out the management clause and the no-strike clause, the Union would agree to leave out arbitration, to which Gillespie said the Company would give its answer after lunch. At 12:10 P.M. the parties adjourned for lunch and resumed at 1:45 P.M. Gillespie said that the Company would not agree to leave out the no-strike clause and management clause and would not agree to the Union's arbitration clause, to which the Union said that it would not agree to let the President of the Company have the final say on grievances since that was no fairer than letting the Union President have the final say. Concerning the Company's proposed management clause, upon inquiry by Attorney Fisher, Cox said that the Union could not now agree to the Company proposal but if agreements were reached on earlier issues, the parties should be able to work out a management clause; Cox asked if the Company would agree to Union proposals No. 15 and 16 on reporting-in pay and call-back pay and Attorney Fisher said that the Company realized the employees should receive some pay, but would not agree to the terms of the Union proposal and that he would write a clause on this issue and present it at the next meeting; concerning vacations Cox inquired if the Company had changed its position on the Union's proposal and Gillespie said that it had not changed its position, that the Company would endeavor to pay the one week's vacation, but would not put such requirement in the contract; concerning holidays, Cox asked if the Company would put the holiday pay at straight time rates not worked, and double time if worked in the contract, and Gillespie said that the Company had never agreed to put holiday pay in the contract even though at the present time the Company was paying straight time for holidays not worked and double time if worked, and, further, that the Company would put in the contract that the Company would endeavor to make such payments but would not be required to do so; concerning hours of work and overtime pay, Cox asked if the Company would agree to Union proposals No. 6, 7, and 8, to which Gillespie replied that the Company would not agree to those proposals, that it was not the Company's intention to stagger hours, but if the Company got enough business, it would want the right to handle the matter as it saw fit, and if a 6 day operation were required, the Company wanted the right to put on more men and lay the present employees off one day a week, to which Cox said that the Union could not agree to such a suggestion for it was the Union's position that if the plant operated 6 days a week, the present employees should be allowed to work 6 days a week, to which Gillespie replied that he was under the impression that the Union only wanted 40 hours of work and the employees wanted 2 days a week off, and Cox said that Gillespie certainly had the wrong impression, to which Gillespie replied that the Company would reconsider the Union's proposals. Cox asked for a meeting on the following day, April 23, 1954 and the Company would not agree to meet; Cox asked for a meeting on Wednesday, May 5, 1954, but Attorney Fisher said that the Company could not meet, and asked for a meeting on May 6, 1954 at 10:30 A.M. The meeting was tentatively set for that date and the meeting of April 22, 1954 adjourned at 3:45 P.M. when Attorney Fisher claimed he had to leave on other business.

By letter of April 28, 1954, Commissioner Morrow confirmed the meeting date of May 6, 1954 at 10:30 A.M. On or about April 29, 1954, the Company discharged M. W. Morris and Onnie Ray, both of whom were members of the Employee Negotiating Committee, about which discharge see Point II *infra.*

The next meeting was on Thursday, May 6, 1954, at 10:40 A.M.; representing the Union were Vice President Wellborn, Representative Cox, and the Employee Committee, including Morris, who had been discharged; for the Company, Attorneys Gillespie and Fisher, Secretary Honea and Mr. Martin; Commissioner Morrow presided. Morrow explained the reason for his absence at the last meeting. Fisher pointed out that Morris had been discharged and that while he had no objection to Morris' representing the Union, the Company did not consider him as an employee or a member of the committee representing the employees. Fisher also stated that two other employees had been discharged for engaging in activity "which was not in their line of work." Wellborn asked that the Company reinstate the two employees so discharged until the Company could prove any charge of wrongdoing; Fisher said the Company would refuse to put the employees back to work. Wellborn asked that employees Morris and Ray be reinstated and Fisher stated that the Company refused to reinstate them, saying that the Company had no intentions of putting the four discharged employees back to work. Fisher then asked Morris to state why he had been discharged, and Wellborn said that Morris would give that information at the proper time. Fisher said that if the Company finds that they were wrong in discharging the four employees they would be reinstated and, again, Wellborn asked the Company to reinstate the employees with full pay from the time of discharge, to which Fisher said that the Company would not do so. Discussion continued on the contract and, concerning the Union's proposals on call-in and reporting-in pay, Fisher was asked if he had the Company proposal on these matters, which he had promised in the last meeting, to which Fisher said that he did not have the proposals, whereupon a general discussion, concerning these matters followed, in which Fisher said that the Company wanted to exclude the truck drivers from call-in and reporting-in pay and that he would write a separate provision covering truck drivers. Concerning seniority Cox asked Fisher if he had the redraft of the seniority clause that he had promised to write at the last meeting, and Fisher replied that he did not have such redraft on seniority. The meeting was adjourned at 12:20 P.M. and resumed at 2:00 P.M. with further discussion on the reporting-in and calling-back pay. Discussion then continued on the grievance procedure as set out in the Union's proposal, during which Wellborn asked Gillespie if he thought it was fair to the employees for the President of the Company to make the final decision on grievances, and Gillespie replied that he was sure that the Company President would be fair, after which Wellborn asked Gillespie if he did not think it would be just as fair for the President of the Union to make the final decision on grievances, to which Gillespie said that the Union President would be biased while the President of the Company would not be biased, and, in any event, the Union would have access to the courts if it did not agree with the decision of the President of the Company. In further discussion relating to grievances and arbitration, Wellborn asked Gillespie what recourse an employee would have if the Company fired him without cause, and Gillespie said that if the Company fired an employee arbitrarily, the Union would have recourse in the courts, to which Wellborn said that under the Company proposal, the Union could not go to Court, to which Gillespie replied that the Union would put a clause in the contract where the Union could go to court and Wellborn asked what was the difference between arbitration and the courts, and Gillespie said that the courts were set up to handle disputes and make settlement and that no third person — arbitrator should tell the Company how to run its business. There was further discussion concerning the right of the Company to promote and transfer without regard to seniority as it saw fit, and when employee Yeary entered into the discussion, Secretary Honea asked Yeary if he had told his foreman that he would not be at work that day, and Yeary said that the checker who took his place was to tell the foreman, to which Honea replied that the checker had not done so, that Yeary had made a mistake and Honea wrote Yeary's name on a slip of paper and Gillespie asked Yeary for his full name, and made a note of it. Fisher said that every contract should have a proposal where an employee doing a good job, better than another employee, that the company could reward this employee for his work. Wellborn said that the Union wanted set rates for classifications and did not want the Company to be able to raise one employees wages and not the other. Commissioner Morrow asked how long the parties wanted to carry on the meeting, and Wellborn said the Union was ready and available to continue, but no agreement was reached to do so. The Union asked for a meeting during that week, of May 10, 1954, but the Company refused to meet during that week, and Commissioner Morrow set the next meeting for Friday, May 21, 1954 at 10:30 A.M. The meting of May 6, 1954 was adjourned at 5:30 P.M.

The next meeting was on May 21, 1954, having been scheduled for 10:30 A.M., but although the Union Committee was present at that time, Attorney Gillespie said that the Company was not ready, since they wanted to discuss some matters further. Present for the Union was Representative Cox and the Employee Committee, including employees Morris and Ray; for the Company, Attorneys Gillespie and Fisher and Mr. Martin. After waiting until 11:10 A.M., the Union Committee departed and at 11:25 A.M. Attorney Gillespie called and said the Company was ready to meet. The parties convened at about 11:25 A.M. At the outset, Gillespie pointed out that the Company's position, as explained in the last meeting, was that employees Morris and Ray were representing the Union and were not representing the Fant employees. Attorney Fisher presented the Union with Company proposed Article V on wages and Cox pointed out that the proposal meant the same as their last proposal. When asked as to the Union's objections as to the proposals, Cox said that it was the same as before, that the Union did not want the Company to have the right to raise or lower wages as it saw fit. Gillespie stated that the Company wanted the right to raise wages if they deemed it advisable, and, particularly individual wages of individual employees. There was further discussion as to this matter, and the Company asked for adjournment until 2:00 P.M. Parties resumed at 1:55 P.M. and discussion was resumed on Company's proposal on wages, Article V, but no agreement was reached. When asked if the Union would redraft this clause, Cox replied that the Union's position was the same as it had been during discussions that morning, that the Union wanted a set wage scale in the contract when signed, so that it would be in effect during the contract. Discussion then turned to arbitration and Cox asked the Company if it would go along on the Union's proposals if arbitration was limited to discharge cases. No agreement on this proposal was reached. Returning to wages, Cox reiterated the Union's position and desire for a stated rate in the contract, and proposed a 15c general wage increase for all classifications. Attorney Fisher said that the Company was unwilling to grant a 15c general wage increase. Gillespie asked what the Union thought of the wage adjustments in the feed mill and Cox said he would have to have additional time to consider those adjustments, to which Gillespie inquired if the Company could have the answer by the next meeting, and Cox said that he would discuss it. Cox inquired if the Company had changed its position on the daily overtime after 8 hours, and Gillespie said that the Company could not agree at this time, and probably would not agree at any other time. Cox asked if the Company had reconsidered its position on vacations, and if the Company was willing to put the provision for paid vacations in the contract, to which Gillespie replied that the Company has reconsidered its position, but has not changed its position, and will not put the vacation plan in the contract. Discussion then turned to a Union's substitute clause for the no-strike and the no lockout clause, with a penalty attached, and Cox said that he had not drafted such a clause, but that the Union did not want to agree to a penalty in the no-strike and no lockout clause. After a 20 minute adjournment, the parties resumed and Gillespie said the Company insisted on a clause to give merit increases and a proposal where the Company could negotiate wage decreases if conditions changed where a decrease was needed. No agreement was reached. The discussion returned to seniority and no agreement was reached. Pointing out that the Union was willing and available to meet at any time, Cox asked Commissioner Morrow to schedule a meeting and after discussion, the next meeting was set for June 11, 1954 at 10:30 A.M.

The next meeting was held on June 11, 1954 at 10:30 A.M.; for the Union were Representative Cox and the Union Committee; for the Company were Attorneys Gillespie and Fisher and Mr. Martin. The meeting was delayed 15 minutes while waiting for Attorneys Fisher and Gillespie and at the outset Mr. Gillespie asked that Mr. Martin be allowed to take local telephone calls since Mr. Honea was unavailable to do so. The Union agreed. Discussion then turned to the Company and Union proposals on wages, particularly the Company's demand for the right to increase or decrease general and individual wages, to which Cox said that the Union decision was to agree to a contract which would be the wage scale until the next negotiations. Gillespie then stated that since the Company wanted to raise wages, he couldn't see why the Union objected to such raise, to which Cox replied that the Union did not want one man to get a raise and not the other, because it would cause dissention. After further discussion as to the handling of wages, Gillespie said that the Company was not changing its position on wanting the right to raise wages as it saw fit. After further discussion as to wages and promotions, Gillespie stated that the parties had been negotiating long enough and it was time they agreed on a contract, to which Cox said that the Union was willing and ready to work out a contract that was fair to the Company and the Union and to allow the Company to grant increases as it saw fit was not fair to the employees. Gillespie asked if the Union wanted to adjourn and discuss the issue of individual increases and Cox said that he was willing to discuss the issue with the committee, but the Union had no further proposal other than to set up rates for each classification that would be stable until next negotiations. At 11:55 A.M. Gillespie requested recess until 1:30 P.M. At 1:45 P.M. discussions resumed, taking up again the matter of wages and after Cox stated that the Union could not agree to the Company's granting individual increases as it saw fit, or putting a sliding scale on each classification, Gillespie said that the parties had to work out something because the Company was not going to do all the giving. Gillespie proposed that an agreement be reached on the present wage scale as the minimum and set a maximum of 20c on each scale, which the Company could effectuate as it saw fit. Cox replied that this would result in favoritism, discrimination and dissention and when the discussion turned to truck drivers, and the effect such proposal might have on them, Fisher stated that the truck drivers should be left out of negotiations and, if so, he could sit down and negotiate with them in 30 minutes. Thereafter, Fisher asked if the Union was ready to agree on the present wage scale and Cox replied by asking if the Company was ready to grant the 15c general increase as proposed by the Union. Fisher said the Company would not agree. Cox said that if some plan on a merit system could be worked out where it could be provided in the contract, the Union would take a look at that, to which Fisher stated that he did not think the Company could agree to a plan where it was controlled by the Company and the Union and suggested that the parties pass this issue until some other idea could be advanced. At 3:15 there was a recess until 3:40 and Gillespie resumed discussion of the merit increase, asking that the Union discuss the matter with Vice President Wellborn, who was absent. Cox said that he would do so. Fisher then inquired if the Union would meet on July 8, 1954 and Cox said the Union was ready to meet tomorrow, Saturday, but Fisher said he could not meet on Saturday and Gillespie said that he did not want to meet again without Commissioner Morrow. Cox asked for a date of June 17 or 18, but Fisher said he could not be available. Gillespie said that he thought the parties ought to wait until Commissioner Morrow got back and with respect to the week beginning June 21, Fisher said that he could not meet during that week. Cox then asked for July 1 or 2 and Fisher said that he could not meet on July 2 because the State Bar Association was in session. However, the next meeting was set for July 2, 1954, at 10:30 A.M.

The next meeting was held on July 2, 1954, although scheduled at 10:30 A.M., it did not get under way for some 15 minutes while the parties waited for Company representatives. The Union was represented by Vice President Wellborn and Representative Cox and the Employee Committee; the Company by Attorneys Fisher and Gillespie and Mr. Martin; Commissioner Morrow presided. Turning to the wage issue, Wellborn said he would be willing to write a clause in the contract that the Company could raise wages if the Union agreed to it, to which Gillespie said that the Company wanted the right to raise wages and would recede from wanting to decrease wages without negotiations. Wellborn asked Gillespie if he had a set plan to grant merit increases and Gillespie said that they did not have any plan, but desired to continue as they had in the past. Wellborn said that the Union did not want the Company to raise one employee and not the other for there could be discrimination and favoritism. Gillespie suggested a minimum and maximum range, and Wellborn said that he was sure that if the Company was in a position to lay before the Union committeemen the reasons for increase in individual wages for an employee, the Union would be in a position to agree, to which Gillespie replied that if the Company put it before the Union committee, the Union would discriminate in favor of Union men and not agree to an increase if the man were not a member of the Union. Wellborn replied that the Union did not operate that way, and the discussion turned to seniority provisions as set forth in the Company proposal. Wellborn said that if some of the wording in the Company's Article VI on seniority were changed, the Union could perhaps agree to it, and Fisher asked Wellborn if he would redraft the clause and Wellborn agreed to redraft paragraphs 2, 3 and 4 and all of Article VII of the grievance procedure. Again the Union stated that it wanted recourse to arbitration, and after some discussion, Wellborn offered to redraft the grievance procedure and arbitration procedure. Commissioner Morrow sought adjournment until 1:30 P.M. and thereafter, at that time, the meeting resumed. Cox asked if the Company had the seniority lists which it had promised to get up ever since last August, and there was some discussion of this. Further discussion turned to holidays and Cox pointed out that the six specific holidays had been agreed to, and that on January 8, 1954, the Company agreed to pay straight time for holidays not worked and double time if worked, and Gillespie stated that he did not remember such agreement. Then Gillespie said that on the same date the Union had promised to submit clauses on the truckers work week and the no-strike clause, but they had not been presented. Cox reminded Gillespie that the clauses had been drafted and submitted by Vice President Wellborn, but the Company would not agree to them. Cox then asked if the Company would agree to put holiday pay in as previously agreed to and Gillespie said that if the parties got the other issues agreed to that they would not have any trouble with holiday pay. Gillespie asked if the Union could agree to Article IV in the Company's proposal and Cox said that if the parties got the other issues settled, they were not far apart on that Article. Cox then asked if the Company had changed its position on putting the vacation plan into the contract and Gillespie said that the Company had given an answer on vacation a long time ago, and had not changed its position, that the Company would endeavor to pay the present vacation as long as it could, but would not agree to put the vacation plan into the contract. Shortly thereafter, Commissioner Morrow asked for an adjournment and Gillespie stated that the parties should not be meeting just for the sake of meeting, but to get something done, and that the Company was going fire its attorneys if an agreement was not reached soon. Cox said that the Union was ready and willing to meet at any time, and was ready to reach an agreement with the Company, when the Company was willing to work out an agreement that was fair to the Company and the Union, and the sooner the next meeting was held, the better. Fisher stated that he could not meet the week of July 6th, and Cox asked for a meeting the week of July 12, the Company asked for a meeting July 16, 1954, and the meeting was set for July

16, 1954 at 10:30 A.M. The meeting was adjourned at 3:00 P.M. by Commissioner Morrow and Attorney Fisher who had other business.

The next meeting was held on Friday, July 16, 1954, at 10:30 A.M. Representing the Union were Representative Cox and the Employee Committee; for the Company, Attorneys Gillespie and Fisher and Mr. Martin; Commissioner Morrow presided; the meeting was delayed for 30 minutes, waiting on the Company representatives and the reporter. The Union presented the Company with the redraft of the seniority clause, and Gillespie stated that the Company wanted some time to go over that matter with Mr. Martin and Mr. Honea. Fisher said that the Union should submit the redrafted proposals and set a next meeting when Wellborn could be present, that he didn't think anything could be accomplished today, to which Cox replied that the Union was ready to study the proposals with the Company, and thought that some headway could be made if the Company would study the proposals. Fisher asked if Cox were in a position to agree to changes in the proposals and Cox said that he would have to know what proposed changes were contemplated before he could say whether he would agree or not. Then the Union presented the Company with redrafted proposals on grievance and arbitration procedure. Gillespie said they would have to have time to look over the new proposals and check them with their own proposals and Cox asked how much time the Company wanted, and Gillespie said that it could not be done in 30 minutes. Morrow asked the Union if he could talk with the Company and Cox agreed. Morrow then reported to the Union that he had talked with the Company and it was not in a position to discuss the redrafted proposals, and so he asked for an adjournment until 2:30 P.M. The meeting was resumed at 2:30 P.M. and Gillespie said the Company had studied the redrafts and was not prepared to give a definite answer. There was some discussion of the redrafts and the Company said no to the sentence reading: "Seniority shall be recognized by the Company, based upon continuous service." Gillespie objected to the second sentence reading: "Promotions, demotions, lay-offs and recalls to employment shall be based upon seniority and ability to do the work," saying it was not acceptable to the Company without some change, such as that contained in the Company's proposal that the employee's qualifications must be equal to the work of any other employee involved or concerned in the action to be taken. Continuing on with the Union's redrafted proposal on seniority, the Company agreed to "(a) when an employee quits his job" regarding a break in seniority, but did not agree to the term "just cause" in "(b) when an employee is discharged for just cause." After further discussion, Gillespie asked if Cox had any authority to make any changes in the seniority proposal and Cox replied that he did have such authority to make changes that were acceptable to the Union, but could make no changes that were not acceptable. The Union's redrafted proposal on seniority was discussed further and Fisher asked the Union to redraft a clause setting out offenses for which an employee would lose his seniority and Cox said that he did not want to write such a clause in a contract, to which Fisher stated that he thought the Company should have the right to fire a man in the morning and hire him back in the afternoon and break his seniority. There was further discussion of the Union's proposal on seniority and Fisher said that he would rewrite (d) and second (a), point-out that the Company objects to giving an employee 48 hour notice for reporting to work when called.

Discussion then turned to the next meeting and Cox asked for an answer on the Union's grievance proposals and Gillespie said the Company would have such an answer at the next meeting. The next meeting was set for July 30, 1954 at 10:30 A.M. and the meeting of July 16, 1954 was adjourned at the request of the Company.

(The above recitation of facts is taken from notes and correspondence contained in the Union's files. Believing that this summary is substantially correct, the Union notes that a court reporter was present during these discussions and if there is any variation assumes that the court reporter's transcript will so show. However, the Union is informed by representatives of the 16th Regional Office of the N.L.R.B. that no request has been made to the reporter to transcribe the record, and that the transcript is, therefore, not available. The Union submits that no determination concerning a refusal to bargain should be made until a full and complete record is available for study by the Field Examiner and the Attorney and the Washington Office, who are called upon to make a decision in this matter.)

Argument and Authorities

It is at once obvious from the above recitation of facts concerning the meetings held between the Company and Union representatives over a period of 12 months, matters which the parties agree they have agreed to are the following:

1. The Preamble of the Company's proposal.

2. Article I. Recognition. of Company's proposal.

3. Article II. Discrimination. of Company's proposal.

4. Article III. Purpose. of Company's proposal, but not Sections A, B. C. and D of Article III.

5. Article X. Bulletin Board. of Company's proposal, as modified to allow bulletin boards at time clocks.

6. Overtime after 40 hours work during any work week.

Although the record shows that the parties agreed at one time, the Company does not now agree to write into the contract its previous agreement to pay straight time for holidays not worked and double time for holidays worked, although it is admitted that this is the present Company practice.

Other than these items, it does not appear that any agreement has been reached on any other proposals, whether by the Union or the Company. In this connection, although the Company admits that it presently has a paid vacation plan, it is not willing to incorporate this plan into a contract.

Also significant on the matter of the Company's good faith desire to obtain an agreement after bargaining with the Union, is its action relative to the wage adjustments in the feed mill. In this instance, the Company was requested by the Union on April 8, 1954, to take a look at the inequities in the feed mill, and to be prepared to discuss these inequities at the next meeting, which was set for April 22, 1954. In the meantime, however, the Company not only looks at these inequities and takes them into consideration, but unilaterally, and without any discussion with the Union whatsoever as to the desired adjustments in cents, makes the adjustments and then on April 22, 1954, presents the Union with these adjustments, as its proposal, when in fact, these wages had already been made effective.

Moreover, between meetings in April, the Company finds a pretext to discharge two members of the Employee Committee who have been negotiating with the Company for months. As we shall point out, *infra*, these discharges are obviously discriminatory, and there is no merit to the pretext upon which the company relies.

Also, please note that at the outset of these meetings and continuing thereafter until the intervention of the Commissioner, the Company's policy relative to setting the next meeting date was one of "don't call us, we'll call you." Although the Union was practically begging for prompt and continuous meetings, the Company could never agree and usually the meetings were spaced over a period of weeks. Note also, in this connection, that the reasons stated for some of the delays was to give the Company time to review the Union's proposals; yet, when the agreed upon date arrived, the Company representatives said that they had not yet had time to study these proposals. On other occasions, the Company was unable to continue discussions of a particular subject because it wanted to submit a redraft of its proposal at the next meeting; yet, at that next meeting, Mr. Fisher did not have the redrafts and so the Company was unable to discuss those provisions.

Insofar as the actual meetings themselves are concerned, it should be noted that the Company announced its unwillingness to agree at the very outset so far as some issues were concerned and never at any time submitted any counterproposals on these issues. On those issues that the Company was willing to discuss, it either asked for further time to give its answer or prepared a counter-proposal; usually, the counter-proposal was written in such a way as to nullify effective collective bargaining, and to leave the matter at issue to be disposed by the Company during the life of the contract.

Also of significance, is the Company's insistence, over the Union's repeated objections, upon scheduling the earlier meetings on Saturday evenings, usually beginning at 7:00 or 7:30 P.M. and refusing to meet longer than two hours. Such short meetings, interspersed as they were with weekly periods of inactivity, were certainly not conducive to collective bargaining.

Regarding collective bargaining, it is clear that the parties must bargain in good faith. The duties of parties in collective bargaining have been summarized by many courts. Particularly applicable here is the language in *NLRB vs. Montgomery Ward & Co.*, 133 F. 2d 676, where the Court said that bargaining "is the obligation of the parties to participate actively in the deliberation so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." And in *NLRB vs. Reed and Prince Mfg. Co.*, 118 F. 2d 874, at 885, the Court said:

> "The respondent was legally bound to confer and negotiate sincerely with the representatives of its employees. It was required to do so with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation. The cases setting forth this obligation are many and it is well settled that a mere formal pretense of collective bargaining with a completely closed mind and without this spirit of cooperation and good faith, is not a fulfillment of this duty."

Also applicable to the facts here is the decision of the 1st Circuit in *NLRB vs. Reed and Prince Mfg. Co.*, 205 F. 2d 131, cert. den. 246 U. S. 887 (1953). There, the Court described the case as "one where the employer is engaged in a lengthy series of bargaining conferences, which got nowhere." In this type of case, the Court said that the question is "whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith, but was unable to arrive at an acceptable agreement with the Union." Continuing, the Court pointed out that "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." And, so, thought the Court, "while the Board cannot force an employer to make a 'concession' on any specific issue, or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the Union, if Section 8(a) (5) is to be read as imposing any substantial obligation at all."

Then the Court reviewed the facts and circumstances of the alleged negotiations between the Union and *Reed and Prince Manufacturing Company.* On many points, a reading of that history sounds much like the reading of the history in the meetings between the Union and Fant Milling Company. For, after summing up all of the meetings and the positions between the parties, the Court recited:

> "The plain fact is that after months of negotiations, as the Board observed, 'practically all the Union could report to its membership in the way of progress was the 10c wage offer — freely given by the respondent in an inflationary period of rising wages'. Even on minor matters . . . the Company withheld assent. The Company's asserted justification for this is that it was 'bargaining technique.' But it may be wondered how the Company could, in good faith, ever expect to arrive at an agreement if the major proposals submitted by the Union are refused on principle and assent on the minor ones is withheld as a matter of bargaining technique."

In the instant case, practically all the Union could report to its membership in the way of progress was Company agreement on recognition, no discrimination, the purpose of the parties to work in harmony, the bulletin board privilege, and time and one-half after 40 hours during any work week. The first two and the last of these "gains" are required by law, the third is obviously desired by all concerned, and the fourth was never in disagreement. But the major matters, such as the principle of embodying in a contract, a set specified wage scale and rates of pay was resisted by the Company unless it "shall have the right to increase the wages of any one or more or all of its employees at any time." Also, the idea of seniority was resisted by the Company, as the statements by Company representatives show, as a matter of principle. The same is true with respect to arbitration of grievances, the Company insisting that the decision of the President should be final and binding. And, just as in the *Reed and Prince* case, the employer refused to incorporate into the contract, the existing practice, there of year end bonuses, but here of paying straight time for holidays not worked and double time for holidays worked. Moreover, the Company refused to incorporate in the contract, its existing vacation pay plan. In each instance, the Company wanted to retain during the life of the contract the prerogative of making changes in these items at will.

Regarding the reasonableness of the Company's position with respect to the very basic principle of having set and certain wage rates incorporated in the life of the contract, we invite attention to that portion of the Company's proposal entitled Article V — Wages, wherein, after setting out certain rates, the proposal contemplates an express reservation of the right of the Company "to establish and put into effect a lower wage scale for any and all employees or any and all departments after posting notice in writing on the bulletin board, and mailing notice in writing to each

Local Union No. 64 and the American Federation of Grain Millers, of its intention to do so, but in the absence of such notice, shall pay the wages set forth during the period of this contract." Then, the proposal continued, by pointing out:

> "In the event the Company should put into effect any plant-wide reduction of wages without consent of the Union or reduce the wages of 40% of the employees without consent of the Union under this provision of this contract, then the Union may at its option terminate this contract, provided a majority of the employees within the bargaining unit have voted to do so, but not otherwise, which termination shall become operative and effective on the 31st day "after notice in writing to the Company by the Union that a majority of the employees within the unit have voted to terminate this contract, and that the Union desires to exercise its option to terminate the contract."

Apropos to this proposal is the language of the 1st Circuit in the *Reed and Prince* case:

> "It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting Union, or even that it might advance the negotiations by affording a basis for discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining."

The same comment and conclusion is applicable to many of the other proposals submitted by the Company, to wit, Article VI. Seniority. wherein the Company desired to consider as one determination of seniority "disposition toward performing the work to be performed;" Article X. Responsibility of Management. wherein it is provided that the Company shall retain the right "to hire, promote, discipline, and discharge employees without discrimination against any employee because of his membership or non-membership in the Union," coupled with the Company's objections to the usual restriction of this right in the terms "for just cause;" Article III, Paragraph A, wherein a strike is defined as "any deliberate failure of any one or more of the employees to perform their normal work at any time when work is available to be performed," in the event of which, by Article III, Paragraph C, "the Union shall pay to the Company one-two hundred fiftieth (1/250) of the total compensation of all employees absent from work due to such strike for the preceding twelve calendar months for each day such strike continues."

As indicated, the Board and the courts have condemned the type of "surface bargaining" in which these facts show that the employer was obviously engaging. Moreover, the Board has consistently found a refusal to bargain where the employer acts unilaterally in connection with matters properly the subject of collective bargaining. As announced in its 17th Annual Report on page 168, under the heading "Individual Bargaining and Unilateral Action," the Board states the principle to be:

> "Once a union has been designated as a statutory representative and an employer is put on notice of the union's majority status, the Act not only imposes on him the affirmative duty to bargain collectively upon request, but requires him to abstain from subverting the designated representative by direct dealings with individual employees."

And the first example given by the Board following this quote is that the employer "is likewise required to refrain from unilaterally granting the employees concessions or making changes in their conditions of employment in disregard of the employees exclusive representative."

Wherefore, under the facts and circumstances of this case, and the authorities cited and quoted above, and others too numerous to mention, the Union submits that there is sufficient evidence of violations to warrant further proceedings at this time under the 8(a) (5) unfair labor practice charge filed by the Union. Therefore, the action of the Regional Director in refusing to issue a complaint should be reversed with the direction that complaint issue alleging violation of Section 8(a) (5).

II

The Regional Director erred in his determination that "it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time," with regard to that portion of the charge alleging violations of Section 8(a) (3) concerning employees M. W. Morris and Onnie Ray.

Statement of Facts

(The Union is not aware of what evidence the Regional Director considered in reaching his determination with respect to 8(a) (3) violations, but, upon information, has reason to believe, and therefore does believe, that the only effort to investigate the Company's position and to obtain evidence relative to these violations was through conferences with Company Attorney O. B. Fisher in Paris, Texas. The Union submits that, based upon the evidence presented by it to the Regional Director, further investigation was warranted, including the obtaining of statements from Company supervisory personnel involved in the discharge of these two employees. In any event, the Union believes the facts to be as follows):

Both Morris and Ray were on the Union's negotiating committee and participated in the meetings with the Company on many occasions prior to their discharge. There is no question of these employees' membership in and activities on behalf of the Union and the Company knowledge thereof.

M. W. Morris went to work for the Company on September 15, 1952 as a trucker and worked in this classification until September of 1953, when he was transferred to the blender. In this operation, Morris' duties consisted of pouring various ingredients into materials to be used as feed mixes. The formula which Morris followed was set up by Johnny Koon in Quality Control. If any change in the formula was to be made, Koon made the change and instructed Morris of it.

At no time was Morris told by Koon or any other supervisor, prior to his discharge, that his work was not satisfactory.

On or about March 15, 1954, the Company began to use an ingredient known as sodium bentonite to mix, along with other ingredients with the feed. At first Koon told Morris to add sodium bentonite with the other ingredients in an amount calculated as 50 pounds to the batch; later the amount was cut to 25 pounds to the batch; and still later, Morris was instructed to cut it to 10 pounds to the batch. In April of 1954, the sodium bentonite supply was exhausted and none was received until on or about April 26th, at which time Koon told Morris to resume using the sodium bentonite and "to get rid of it." Koon did not tell Morris how much to use to a batch of feed mix.

It is conceded that sodium bentonite is not harmful to the feed mix and that its principle purpose is to add weight to the feed.

After the arrival of the second supply of sodium bentonite, Morris, without specific instructions, from Koon other than "to get rid of it," began to add from 50 to 100 pounds of the ingredient to the others to mix with a batch of feed. He did this for approximately three days and was told no different and received no instructions from Koon.

On April 29, 1954, at 3:45 P.M. Company officials: Blackburn, Robinson and Koon came to Morris and asked for him to step aside a few moments, that Blackburn wanted to talk to him about the feed mixes. Blackburn then asked how much sodium bentonite Morris had been using to the batch and he told him. Blackburn, upon learning of this said that Morris had messed things up and that he had a notion to pull his time card.

Thereafter, that day, when Morris went to punch out at quitting time, his card was gone and he was told by Koon to wait in the office. Subsequently Robinson gave him his check but did not say that he was fired. However, the check had final written on it. Robinson said to Morris: "I hate to do this, I feel like crying."

Morris and other employees know that the mixes which Blackburn said he had "messed up" were loaded in cars and shipped forward to the customers.

As already indicated in Section I above, Union representatives requested the Company to reinstate Morris, during the meeting on May 6, 1954. The Company refused to do so.

Onnie Ray was employed by the Company on June 19, 1950 as a trucker and has continued in that classification. Part of his duties were to "truck up" the ingredients to be used in the feed mix to the blender, where Morris was working.

At no time was Ray told by any of his supervisors that his work was not satisfactory.

On April 29, 1954, at about 3:45 P.M. Ray was picking up empty sacks around the premises and Superintendent Blackburn approached him and asked him to bring the sacks around to the blender to talk with him. There, Blackburn asked if Ray knew that Morris was pouring 100 pounds of sodium bentonite into the batch and Ray said yes. Blackburn said that if Ray knew that Morris was pouring in that quantity of sodium bentonite he should have told one of the foremen. However, Blackburn said nothing further and gave no indication that his remarks to Ray were to be considered as anything but a warning or reprimand.

Thereafter, at quitting time, Ray went to the time clock and Koon told him that Robinson wanted to see him in the office. In the office, Robinson handed Ray his check, but said nothing other than to remark as he had made to Morris, to the effect that he felt like crying.

Not having been told by any of his supervisors the reason for his discharge, Ray called Blackburn at about 5:00 P.M. from his home and asked him why he was fired. Blackburn replied that Ray should know, for he knew that Morris was putting sodium bentonite in the feed and added that Ray should come down to the plant at 8:00 o'clock the next morning and Blackburn and Robinson would talk to him.

The next morning Ray went to the plant and at about 9:00 A.M. Blackburn and Robinson talked with him. He asked Blackburn why he was fired. Blackburn said that he knew why he was fired, that "you were putting too much stuff in the feed." Ray denied that he was putting anything in the feed, saying "I did not have anything to do with the feed mix." Blackburn said that Ray should have come to him and told him or Robinson how much sodium bentonite Morris was putting into the feed. And that his failure to do so was the cause for discharge. Ray asked Blackburn and Robinson what he could tell the next employer to whom he applied as the reason for his discharge. Robinson and Blackburn said that Ray did not have to tell them that he had been fired, but could tell them that he had quit. Robinson and Blackburn said that they would recommend him.

Ray likewise has personal knowledge that the feed that Blackburn claimed had been ruined by Morris was loaded in the cars and shipped to customers.

Argument and Authorities

All of the facts in this case, it is submitted, show a prima facie case of discriminatory discharge of Morris and Ray. There is no problem concerning company knowledge of the union membership and activities of these two employees. The Company's hostility and anti-union animus is indicated in the meetings which have been going on with the Union for several months. These two employees were on the Negotiating Committee and on several occasions spoke up in support of the Union's requests. Of course, the Company advances a reason for the discharge of these men, but those reasons are obviously based upon the opportunity at the moment. The seizing of an occasion as a pretext for the lawful discharge of two strong union adherents.

Consider Onnie Ray, a trucker, who had no duties with respect to the operation of the blender. His job was to "truck up" the ingredients to the blender for handling by other personnel who receive their instructions from Quality Control in the person of Mr. Koon. Not being a blender, but only a trucker, he was not required to know, and was not told by Koon, the amount of sodium bentonite to mix with the other ingredients to put into the feed. Even if he did know that Morris was putting 100 pounds per batch, how is he to know that that was excessive? How was he to know that he had a responsibility to go to Koon or some other supervisor and state that Morris was putting 100 pounds of sodium bentonite into a batch? Apparently, it was not until he was told by Blackburn on the afternoon of his discharge that if he knew Morris was pouring in such an amount of sodium bentonite he "should have told one of the foremen."

Substantially the same considerations applied to Morris. Having been told by Koon, with regard to the second car of sodium bentonite, "to get rid of it," without instructions as to how many pounds to use to the batch, contrary to the previous explicit instructions from time to time in disposing of the first batch, Morris would appear to be the victim of an entrapment scheme. Certainly, during the two days after the arrival of the second car of sodium bentonite, neither Koon nor any supervisor gave him any instructions to countermand Koon's directions to Morris to "get rid of it." If the Company was really disturbed over the alleged excessive amount of sodium bentonite going into the feed mix, an accusing finger should more properly be pointed at Koon himself. Being in Quality Control, it was Mr. Koon's duty to control the quality of the feed mix. Such instructions as given by him to Morris with regard to the second car of sodium bentonite can hardly be construed as "control". Under these circumstances, the question immediately arises: If Ray is to be discharged for failing to tell a supervisor that Morris was pouring 100 pounds of sodium bentonite into the feed mix, what punishment should be meted out to Koon, whose very title makes him responsible for the amount of sodium bentonite to be used?

And in connection with the Company's desire to rid itself of members of the Negotiating Committee, we point to the incident involving Mr. Yeary, also a member of the Committee, during the meeting of May 6, 1954, which was the first meeting after the discharge of Ray and Morris. It will be recalled that in discussing the matter of promotions and transfers, Secretary Honea stated that a junior employee should have the right to a promotion or transfer if the superintendent thought he should have the job. Mr. Yeary spoke up and said that employees did not have an opportunity for much advancement and that they could not go from one department to another. Mr. Fisher said that he thought the employees should have the right to go from one department to another on promotions and didn't think that the Fant Milling Company would prevent one from going from one department to another. To this Mr. Yeary pointed out that about a year ago, he applied for a job in the flour mill and his foreman in the feed mill would not let him take the job. The foreman in the flour mill said that there was no opening in the flour mill, and yet a promotion was made to the flour mill the very same day. Secretary Honea replied that he did not know about this, and if he had known, he would have had it investigated. Then Secretary Honea asked Yeary if he had told his foreman that he would not be at work that meeting day, and Yeary said that the checker who took his place was to tell the foreman. Mr. Honea said the checker did not tell the foreman and that Yeary had made a mistake. Whereupon Mr. Honea wrote Yeary's name on a slip of paper and Attorney

Gillespie asked Yeary his full name and made a note of it.

The Union submits that the evidence is clear that the Company was looking for, and in the case of Morris and Ray, found, a pretext for ridding itself of members of the Negotiating Committee. The discharge of Morris and Ray, under the circumstances outlined above, for such obviously tissue-thin reasons and the veiled threat to Yeary at the very next meeting cannot, and should not be dismissed as evidence of the discriminatory motive entertained by the Company. Certainly; from the above facts there does appear to be sufficient evidence of violations to warrant further proceedings at this time.

Wherefore, the Union submits that the action of the Regional Director in refusing to issue a complaint relating to the discharges of W. M. Morris and Onnie Ray should be reversed, with directions that complaint issue on this portion of the 8(a) (3) charge. Alternatively, it should be found that a prima facie showing of the violation has been made and the Regional Director instructed to investigate further by interrogating the supervisory personnel involved in these discharges.

CONCLUSION

The extraordinary length of this request for review was necessitated by the failure of the Regional Office to obtain the transcript of the discussions between the parties in the various meetings from August 1953 through July 1954, and by the reported failure of the Regional Director to obtain statements from the supervisory personnel involved in the discharges. Therefore, in order to present the full facts, as known to the Union, it was deemed advisable to set them out at some length for fear that the file of the Regional Office would not be as complete as desirable. Having done so, the Union submits that the facts and circumstances in this case warrant a reversal of the action of the Regional Director and a direction that complaint issue alleging violations of Section 8(a) (3) and Section 8(a) (5) and derivative violations of Section 8(a) (1).

Respectfully submitted,

MULLINAX & WELLS
(Signed) By HOUSTON CLINTON, JR.
Houston Clinton, Jr.
1716 Jackson Street
Dallas 1, Texas

This is to certify that on this 31st day of July, 1954, copies of this Request for Review were mailed to Edwin A. Elliott, Regional Director, N.L.R.B., Room 2093, 300 West Vickery, Fort Worth, Texas.

(Signed) HOUSTON CLINTON, JR.
HOUSTON CLINTON, JR.

Room 2093,
300 West Vickery

January 24, 1955

Mr. Ralph Cox, Int'l Repr.
American Federation of Grain Millers, AFL
619 E. Maple
Enid, Oklahoma

Re: Fant Milling Company
Case No. 16-CA-752

My dear Mr. Cox:

This is to advise that upon reconsideration of the facts and circumstances, and additional evidence furnished us in connection with our investigation in the above matter, we have decided to and are hereby withdrawing our refusal to issue Complaint with respect to the 8(a) (5) allegation of refusal to bargain, dated July 13, 1954. We shall proceed with our investigation in due course.

Sincerely,

Edwin A. Elliott
Regional Director

REGISTERED
RETURN RECEIPT REQUESTED
Cc: General Counsel, NLRB, Washington 25, D. C.

Mr. O. B. Fisher
Liberty National Bank Bldg.
Paris, Texas

Fant Milling Company
Attn: Fred Honea, Secy
408 E. King
Sherman, Texas

Mr. Campbell Gillespie
Gillespie & Gillespie
210 M & P Bank Bldg.
Sherman, Texas

(Return Receipt Omitted)

* * * *

(SEAL)

National Labor Relations Board
Washington 25, D. C.
August 12, 1955

Houston Clinton, Jr., Esq.
Mullinax and Wells
1716 Jackson Street
Dallas 1, Texas

Re: Fant Milling Company
Case No. 16-CA-752

Dear Mr. Clinton:

Your appeal from the Regional Director's refusal to issue a complaint in the above case, charging violations of Section 8 (a) (1), (3), and (5) of the National Labor Relations Act, has been duly considered by the General Counsel.

The General Counsel sustains the ruling of the Regional Director insofar as the 8 (a) (1) and (3) allegations are concerned. Like the Regional Director, the General Counsel concludes that there is insufficient evidence to warrant further proceedings thereon.

With respect to the 8 (a) (5) allegation of refusal to bargain; the Regional Director advised the parties by letter dated January 24, 1955, that he was withdrawing his dismissal of the 8 (a) (5) portion of the charge and was continuing with the investigation thereof. All further inquiries with respect to the 8 (a) (5) allegation should be addressed to the Regional Director.

Very truly yours,

William Feldesman
Assistant General Counsel
FOR THE GENERAL
COUNSEL

cc: Director, 16th Region

Mr. O. B. Fisher, Liberty National Bank Building,
Paris, Texas

Fred Honea, Secy., Fant Milling Co.,
408 E. King, Sherman, Texas

Mr. Campbell Gillespie, Gillespie & Gillespie,
210 M & P Bank Building, Sherman, Texas

Ralph Cox, Int'l Rep., American Federation of
Grain Millers, AFL 610 E. Maple, Enid, Oklahoma.

REGISTERED MAIL

NOTICE OF HEARING

United States of America
Before The National Labor Relations Board
Sixteenth Region

In the Matter of

Fant Milling Company
and Case No. 16-CA-752
American Federation of Grain Millers, AFL

PLEASE TAKE NOTICE that on the 20th day of September, 1955, at ten o'clock in the forenoon, in the County Court House, in the City of Sherman, Texas,

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto; at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of a verified answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

IN WITNESS WHEREOF the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Hearing to be signed by the Regional Director for the Sixteenth Region on this 17th day of August, 1955.

(Signed) EDWIN A. ELLIOTT
Regional Director,
National Labor Relations Board
Suite 2093, 300 West Vickery
Fort Worth 4, Texas

(Address)

COMPLAINT

(Number and Title Omitted)

It having been charged by American Federation of Grain Millers, AFL, 619 E. Maple, Enid, Oklahoma, under date of May 20, 1954, that Fant Milling Company, 408 E. King, Sherman, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act; the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is and has been at all times material hereto, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 408 E. King in the City of Sherman, Texas, and is now and has been at all times herein mentioned continuously engaged at said place of business, hereinafter referred to as the "Sherman Plant" in the milling of flour and similar products from grain and in the manufacture and sale of baking powder, mixed feeds, cake mixes and related products. Respondent also maintains a plant at Gainesville, Texas, and distributing warehouses at various other cities in Texas.

2. Respondent, in the course and conduct of its business operations at its Sherman Plant, during the twelve-month period ending December 31, 1954, which period is representative of all times material hereto, purchased in excess of $10,000,000 worth of raw materials, consisting principally of grain, of which more than $2,000,000 worth was shipped in interstate commerce to the Sherman Plant from points outside the State of Texas. During the same period, Respondent sold products consisting principally of flour, mixed feeds, baking powder, cake mixes and related products valued in excess of $10,000,000, of which more than $2,000,000 worth was shipped in interstate commerce from its Sherman plant to points outside the State of Texas.

3. Copy of the charge hereinabove referred to was served on Respondent by registered mail on May 21, 1954.

4. American Federation of Grain Millers, AFL, hereinafter referred to as the Union, is a labor organization within the meaning of section 2, subsection (5), of the Act.

5. In order to insure to the employees of Respondent the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act, all production and maintenance employees of Respondent employed at its Sherman plant, exclusive of chemists and chemists' helpers, office clerical employees, buyers, salesmen, watchmen, guards and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9, subsection (b), of the Act.

6. On or about June 19, 1953, a majority of the employees of Respondent in the unit described above in paragraph 5, designated or selected the union as their representative for the purposes of collective bargaining with Respondent and at all times since that date the Union has been the representative for the purposes of collective bargaining of a majority of the employees in said unit, and, by virtue of section 9, subsection (a), of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

7. On or about November 21, 1953, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment, with the Union as the exclusive representative of

all employees of Respondent in the unit described above in paragraph 5.

8. On or about November 21, 1953, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph 5.

9. On or about October 7, 1954, Respondent, without notice to the Union, put into effect a general wage increase for all employees in the unit described above in paragraph 5.

10. By the acts described above in paragraphs 8 and 9, Respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (5) of the Act.

11. By the acts described above in paragraphs 8 and 9, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (1), of the Act.

12. The activities of Respondent, described above in paragraphs 8 and 9, occurring in connection with the operations of Respondent, described above in paragraphs 1 and 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and

tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of section 8 (a), subsections (1) and (5), and section 2, subsections (6) and (7), of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this complaint to be signed and issued by the Regional Director for the Sixteenth Region on the 17th day of August, 1955, against Fant Milling Company, Respondent herein.

(Signed) EDWIN A. ELLIOTT
Edwin A. Elliott,
Regional Director
National Labor Relations Board
Sixteenth Region

(SEAL)

* * * *

(Affidavit of Service and Return Receipts Omitted)

RESPONDENT'S MOTION TO DISMISS, MOTION TO STRIKE, AND ORIGINAL ANSWER SUBJECT TO SUCH MOTIONS.

(Number and Title Omitted)

I.

MOTION TO DISMISS:

Respondent moves to dismiss the complaint in its entirety upon the grounds separately and collectively:

(1) It is not based upon any charge verified or sworn to as required by Section 102.11 NLRB Rules and Regulations, Series 6.

(2) There is no affirmative allegation in the complaint that is issued pursuant to a charge made by a labor organization with an affidavit on file with the Board executed contemporaneously or within the preceding twelve month period by each officer of such labor organization as required by Section 159(h) of the Act.

(3) It is insufficient to authorize the making of any order by the National Labor Relations Board against Respondent.

(4) There is no affirmative allegation that the charging union prior to the filing of the charge and issuance of the complaint filed with the Secretary of Labor copies of its Constitution and By-laws and report as required by Section 159(f) of the Act.

(5) There is no affirmative allegation in the complaint that the charging labor union, American Federation of Grain Millers, AFL, has complied with Section 159(g) of the Act.

(6) The complaint is an independent action of the Board not authorized by the Act.

(7) The complaint and exhibit made a part thereof show that such complaint is purportedly based upon a charge filed May 20, 1954, by Ralph Cox, International Representative of American Federation of Grain Millers, AFL, (No local) wherein the sole charges and affirmative allegations claiming unfair labor practices within the meaning of Section 8(a) subsections (1) (3) and (5) of the Act are in substance:

(a) That Respondent on or about November 20, 1953, refused to bargain collectively with agents of American Federation of Grain Millers, AFL, chosen by a majority of its employees at its plant to represent them for the purposes of collectively bargaining in respect to rates of pay, wages and other conditions of employment.

(b) That Respondent discharged named employees on April 23rd and April 24th, 1954, because of their membership and activities in behalf of American Federation of Grain Millers, AFL, a labor organization, and at all times since such dates refused to employ said persons so discharged.

(c) That by said acts and other acts Respondent restrained, interfered with and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act.

There is no allegation in the charge that Respondent at any time subsequent to on or about November 20, 1953, refused to bargain collectively with the union as the bargaining agent of its employees. There is no allegation in the charge with reference to Respondent having put into effect a wage increase for employees within the unit described in paragraph 5 of the complaint. The complaint in its entirety is based upon the alleged refusal of Respondent to bargain with the union on or about November 21, 1953, and at all times thereafter, not on or about November 20, 1953, as stated in the purported charge, and the allegation that Respondent on or about October 7, 1954, without notice to the union put into effect a general wage increase for all employees in the unit. Such allegations in the complaint do not constitute an enlargement of allegations in the charge but are new and different charges against Respondent neither embodied in nor contemplated by the one charge filed May 20, 1954.

II.

MOTION TO STRIKE:

Subject to the foregoing motion to dismiss, Respondent moves to strike:

(1) Paragraphs 7, 8 and 9 and each of said paragraphs because such paragraphs are not pursuant to any charge served upon Respondent within the contemplation of Section 160 (b) of the Act.

(2) That part of paragraph 8

> "And at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the union as the exclusive representative of all of the employees in the unit."

because such part of said paragraph 8 is not pursuant to any charge served upon Respondent within the meaning and contemplation of Section 160(b) of the Act.

(3) Paragraph 9 of the complaint because such paragraph is not pursuant to any charge served upon Respondent within the meaning and contemplation of Section 160(b) of the Act.

(4) That part of the introductory unnumbered first paragraph of the complaint wherein it is alleged:

> "It having been charged by American Federation of Grain Millers, AFL, 619 Maple, Enid, Oklahoma, under date of May 20, 1954, that Fant Milling Company, 408 East King, Sherman, Texas *** is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act."

because such part of said paragraph is not pursuant to any charge made and served upon Respondent within the meaning and contemplation of Section 160(b) of the Act.

III.

ANSWER:

Subject to the foregoing motion to dismiss and motion to strike, Respondent for answer to said complaint says that its Post Office address is Sherman, Texas, and further:

(1) That it denies the allegations contained in the introductory paragraph of the complaint to the effect that it was charged by American Federation of Grain Millers that Respondent is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Relations Act.

(2) That it admits the allegations contained in paragraphs numbered 1, 2 and 4 of the complaint and denies the allegations contained in paragraphs numbered 5, 6, 7, 8, 10, 11, 12 and 13 of the complaint.

(3) That it denies the allegation contained in paragraph 3 of the complaint but in connection with such denial admits that there was served upon it a copy of the charge attached to the complaint served with notice of hearing hereof.

(4) Respondent does not have sufficient information upon which to form a belief as to the truth or falsity of the specific allegation contained in paragraph 9 of the complaint and therefore neither admits nor denies such allegation but in connection therewith alleges:

(a) That on different occasions, and particularly on September 17, 1954, the complaining union, then claiming to be the sole bargaining agent of the employees within the alleged bargaining unit at Respondent's plant, refused to bargain or engage in any discussion with Respondent concerning wages.

(b) The complaining union had theretofore consistently refused to seriously discuss or to make any serious attempt to negotiate an agreement on wages to be carried into a contract.

(c) That throughout the period of its bargaining with the complaining union and for many months prior to October 7, 1954, Respondent stated in substance that its desire and position with reference to wages was that the employees at its plant should receive wages equal to or above wages received by persons similarly employed in the area of Sherman, Texas, and that on October 6th, 1954, it had been informed and upon information believed that a general wage increase of 7c per hour to the employees at its plant was necessary in order to sustain such position and on such date announced such general wage increase to be effective as of October 4th, 1954.

(d) That the complaining union approved such wage increase.

WHEREFORE, Respondent prays that the complaint and every charge therein contained be dismissed and that it be discharged.

GILLESPIE & GILLESPIE
Sherman, Texas

FISHER, McLAUGHLIN &
HARRISON
Paris, Texas
Attorneys for Respondent

/s/ O. B. FISHER
Of Counsel

STATE OF TEXAS)
COUNTY OF LAMAR)

BEFORE ME, the undersigned authority, on this day personally appeared FRED HONEA, Executive Vice-President, Secretary and Treasurer of FANT MILLING COMPANY, who being by me duly sworn, states upon oath that he has read the foregoing motions and answer subject to such motions, that the statements therein contained are true except such as are stated upon information and belief, which are believed to be true.

(Signed) FRED HONEA

SWORN TO AND SUBSCRIBED BEFORE ME, this the 24th day of August, 1955.

(Signed) MARGUERITE BEARD
(SEAL)
Notary Public,
Lamar County, Texas.

ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE

(Number and Title Omitted)

The Union having filed a charge and the General Counsel having issued a complaint; and

Respondent Company having moved to dismiss the entire complaint and to strike certain paragraphs thereof, and said motions having been referred to the undersigned for ruling; and

The charge, the complaint, and said motions having been read, examined, and duly considered;

IT IS HEREBY ORDERED that said motions are denied in their entirety, with leave to renew them before the Trial Examiner at the hearing.

(Signed) ALBA B. MARTIN
Alba B. Martin
Trial Examiner

Dated: September 2, 1955

(Envelope Omitted)

(Affidavit of Service and Return Receipts Omitted)

* * * *

October 31, 1955

Harrison C. Thompson, Jr., Esq.
National Labor Relations Board
Room 2093
300 West Vickery
Fort Worth, Texas

Re: *Fant Milling Company*
and American Federation
of Grain Millers, AFL
Case No. 16-CA-752

Dear Sir:

On September 27, 1955, the hearing in the above-captioned matter was adjourned *sine die* so that opportunity could be afforded counsel for each of the parties to examine the stenographic transcripts of meetings between the parties, according to the stipulation spread upon the record at the hearing on that day.

Sufficient time having elapsed since the adjournment to have permitted you an opportunity to examine the transcripts and to confer with other counsel, I now request that you notify me not later than November 7, 1955, whether you desire a resumption of the hearing.

Very truly yours,

Arthur E. Reyman
Trial Examiner

October 31, 1955

Gillespie & Gillespie
210 M & P Bank Building
Sherman, Texas

Att: *C. H. Gillespie, Jr., Esq.*

Re: *Fant Milling Company*
and American Federation
of Grain Millers, AFL
Case No. 16-CA-752

Dear Sir:

On September 27, 1955, the hearing in the above-captioned matter was adjourned *sine die* so that opportunity could be afforded counsel for each of the parties to examine the stenographic transcripts of meetings between the parties, according to the stipulation spread upon the record at the hearing on that day.

Sufficient time having elapsed since the adjournment to have permitted you an opportunity to examine the transcripts and to confer with other counsel, I now request that you notify me not later than November 7, 1955, whether you desire a resumption of the hearing.

Very truly yours,

Arthur E. Reyman
Trial Examiner

October 31, 1955

Fisher, McLaughlin & Harrison
Liberty Bank Building
Paris, Texas.

Att: *O. B. Fisher, Esq.*

Re: *Fant Milling Company*
and American Federation
of Grain Millers, AFL
Case No. 16-CA-752

Dear Sir:

On September 27, 1955, the hearing in the above-captioned matter was adjourned *sine die* so that opportunity could be afforded counsel for each of the parties to examine the stenographic transcripts of meetings between the parties, according to the stipulation spread upon the record at the hearing on that day.

Sufficient time having elapsed since the adjournment to have permitted you an opportunity to examine the transcripts and to confer with other counsel, I now request that you notify me not later than November 7, 1955, whether you desire a resumption of the hearing.

Very truly yours,

Arthur E. Reyman
Trial Examiner

October 31, 1955

Mullinax and Wells,
1716 Jackson Street
Dallas, Texas

Att: *Houston Clinton, Jr.*

Re: *Fant Milling Company*
and American Federation
of Grain Millers, AFL
Case No. 16-CA-752

Dear Sir:

On September 27, 1955, the hearing in the above-captioned matter was adjourned *sine die* so that opportunity could be afforded counsel for each of the parties to examine the stenographic transcripts of meetings between the parties, according to the stipulation spread upon the record at the hearing on that day.

Sufficient time having elapsed since the adjournment to have permitted you an opportunity to examine the transcripts and to confer with other counsel, I now request that you notify me not later than November 7, 1955, whether you desire a resumption of the hearing.

Very truly yours,

Arthur E. Reyman
Trial Examiner

TELEGRAPHIC MESSAGE

Official Business — U. S. Government

From NATIONAL LABOR RELATIONS BOARD

Bureau ______________________

Chg. Appropriation ______________________

FORT WORTH, TEXAS
NOVEMBER 10, 1955

BOOK OF FOUR

MULLINAX & WELLS, ATTORNEYS
1610 ICT BUILDING
DALLAS, TEXAS

FISHER, McLAUGHLIN & HARRISON, ATTORNEYS
LIBERTY BANK BUILDING
PARIS, TEXAS

GILLESPIE & GILLESPIE, ATTORNEYS
210 M & P BANK BUILDING
SHERMAN, TEXAS

MR. HARRISON C. THOMPSON, JR., ATTORNEY
NATIONAL LABOR RELATIONS BOARD
ROOM 2093, 300 WEST VICKERY
FORT WORTH, TEXAS

RE FANT MILLING CO., 16-CA-752. HAVE MAILED TO YOU ORDER REOPENING HEARING, FANT MILLING COMPANY. DATE OF REOPENING NOVEMBER 15, 1955, TEN AM, (CST) COUNTY COURT HOUSE, SHERMAN, TEXAS.

ARTHUR E. REYMAN
TRIAL EXAMINER
NATIONAL LABOR
RELATIONS BOARD

PLEASE CONFIRM DELIVERY

ORDER TO RESUME HEARING

(Number and Title Omitted)

This matter having come on to be heard before the undersigned Trial Examiner at Sherman, Texas, on September 20, 1955, pursuant to notice, and thereafter having been adjourned *sine die* on September 27, 1955, for reasons set forth in the transcript of the Official Proceedings of that day, and it now appearing that each party hereto has had sufficient time in which to prepare and to introduce other reliable, probative and substantial evidence for the ultimate determination of the case, it is, this 10th day of November, 1955,

ORDERED

That the hearing hereof be resumed at 10 o'clock a.m. (C.S.T.) on the 15th day of November, 1955, at the County Court House, Grayson County, Sherman, Texas.

(Signed) ARTHUR E. REYMAN
ARTHUR E. REYMAN
Trial Examiner

ORDER TRANSFERRING CASE TO THE NATIONAL LABOR RELATIONS BOARD

United States of America
Before The National Labor Relations Board

Fant Milling Company

and Case No. 16-CA-752

American Federation of Grain Millers, AFL-CIO

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report and Recommended Order of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., March 15, 1956.

By direction of the Board:

(Signed) FRANK M. KLEILER
Frank M. Kleiler
Executive Secretary.

NOTE: Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto.

Exceptions to the Intermediate Report in this case must be received by the Board in Washington, D. C., on or before April 9, 1956.

(Notice and Excerpts from Rules and Regulations of National Labor Relations Board Series 6 Omitted)

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* * * *

EXCEPTIONS AND OBJECTIONS TO TRIAL EXAMINER'S INTERMEDIATE REPORT AND RECOMMENDED ORDER AND PLEADINGS.

(Number and Title Omitted)

Comes now Fant Milling Company, hereinafter referred to as Respondent, and makes this, its exceptions and objections to the Intermediate Report and Recommended Order issued by Arthur E. Reyman, Trial Examiner, dated at Washington, D. C., on March 15, 1956, and its exceptions and objections to the record and hearing. (All page and line references herein contained are to the Supplemental Intermediate Report unless otherwise indicated).

1. Respondent excepts to the statement that on May 20, 1954, the American Federation of Grain Millers filed a charge against Respondent. (Page 137, lines 24-27)

2. Respondent excepts to the statement of the Trial Examiner that on the basis of the charge filed, General Counsel of the Board instituted this proceeding under Section 10 (b) of the Act causing a complaint to be signed and issued for the Regional Director of the 16th Region against Respondent. (Page 138, lines 6-12)

3. Respondent excepts to the action of the Trial Examiner in failing to dismiss the complaint in its entirety and in overruling the motion of Respondent to dismiss the complaint. (See pleadings)

4. Respondent excepts to the hearing in its entirety because it was not held before a duly designated Trial Examiner and further excepts to the statement of the Trial Examiner that he had been duly designated by the Chief Trial Examiner to hear the case. (Page 141, lines 18-20)

5. Respondent excepts to the findings of the Trial Examiner that Respondent's motion to dismiss and motion to strike subject thereto is not well taken; that the charge is within the requirements of Section 10 (b) of the Act; and that the complaint follows the allegations of the charge. (Page 142, lines 13-32; page 143, lines 1-2)

6. Respondent excepts to the statement of the Trial Examiner that Respondent's position with respect to its motion to dismiss is not well taken. (Page 144, lines 13-14)

7. Respondent excepts to the finding of the Trial Examiner that the complaint is sufficient on its face and that the several grounds in support of Respondent's motion to dismiss are not well taken and the denial, in its entirety, of Respondent's motion to dismiss. (Page 145, lines 32-33; page 146, lines 1-9)

8. Respondent excepts to the statement of the Trial Examiner that the result of the elections show 94 eligible employees out of 179 voted for the union. (Page 148, lines 9-10)

9. Respondent excepts to the Trial Examiner's statement that at the September 5 meeting, a number of the paragraphs of the Union's proposal were discussed and generally objected to and criticized by Gillespie speaking for the Company. (Page 150, lines 2-4)

10. Respondent excepts and objects to the resume of the bargaining meetings made by the Trial Examiner in that they are incomplete and do not fairly present the bargaining meetings held by the Union and Respondent. (Pages 156-162)

11. Respondent excepts and objects to the statement of Trial Examiner that on the points at issue in the June 11, 1954, bargaining meeting, the Union stood firm, and the Company refused to yield without some suggestion of compromise from the Union. (Page 159, lines 24-26)

12. Respondent excepts to the statement of the Trial Examiner that at the October 15, 1954 bargaining meeting

the general wage increase of October 7th was discussed. (Page 161, lines 28-33)

13. Respondent excepts to the statement of the Trial Examiner that Martin testified that Fant expressly told the bargaining committee for the Company that he would not sign a contract that contained (1) an arbitration clause, (2) a no-strike and a no-lockout clause where no penalty was attached and (3) that he would not accept seniority as a sole governing factor in making promotions, demotions, recalls or layoffs. (Page 164, lines 7-13)

14. Respondent excepts to the statement of the Trial Examiner that it appears from Martin that Fant's instructions were not plainly stated to the Union representatives as being instructions of Fant, but Wellborn was informed that on these issues the representatives of the Company had taken an irrevocable stand. (Page 164, lines 13-17)

15. Respondent excepts to the statement of the Trial Examiner that Wellborn made no objections to the contemplated wage increase later announced on *October 7th.* (Page 165, lines 9-13)

16. Respondent excepts to the statement of the Trial Examiner that it appears that the Company, without prior notice to the Union, in April, 1954, made certain revisions in its pay scale and that in October, 1954, without formal consultation with or communication to the Union the Company made a general wage increase of 7 cents per hour to employees within the bargaining unit. (Page 165, lines 18-25)

17. Respondent excepts to the statement of the Trial Examiner that on October 6, 1954, the Company posted a notice "Pay Bulletin" announcing the general wage increase and that the Union had not been consulted concerning the form of the notice or its posting. (Page 165, lines 25-28)

18. Respondent excepts to the statement of the Trial Examiner that upon the pleadings it is possible for the Trial Examiner to make a finding that the Company did grant a general wage increase without the prior knowledge or consent of the Union as alleged in the complaint. (Page 167, lines 11-14)

19. Respondent excepts to the statement of the Trial Examiner that it is hard to understand how the Union representatives could bargain as long as they did and come to a complete impasse with the Company. (Page 170, lines 9-12)

20. Respondent excepts to the statement of the Trial Examiner that the Company from the first moment of meeting refused to accede or to bargain in any respect (except to engage in general discussion) on important matters such as seniority, the writing of a holiday clause and other conditions requested by the Union. (Page 170, lines 14-20)

21. Respondent excepts to the statement of the Trial Examiner that the Union certainly made more concessions during this long period of bargaining then the Company did. (Page 171, lines 7-8)

22. Respondent excepts to the statement of the Trial Examiner that an important question is whether or not a refusal on the part of the Respondent to bargain came at a time when it was honestly at an impasse with the Union *and* was fully convinced the Union no longer represented a majority of the employees in the bargaining unit. (Page 171, lines 27-32)

23. Respondent excepts to the statement of the Trial Examiner that the critical question is whether under the circumstances the employer was entitled to withdraw recognition of the Union on a basis of a good faith doubt to the Union's majority. (Page 172, lines 1-4)

24. Respondent excepts to the statement of the Trial Examiner that Respondent bypassed the certified representatives of its employees in granting the wage increase, that such constituted unilateral action by Respondent, and such conduct reasonably must have been interpreted by Respondent's employees as a withdrawal of recognition of the Union's representative status and was, in effect, an impairment of the collective bargaining process and that as such constituted per se a violation of Section 8 (a) subdivisions 5 and 1 of the Act. (Page 172, lines 23-31)

25. Respondent excepts to the statement of the Trial Examiner that the reliance of Respondent on the case of *Mid-Continent Petroleum Corporation* 204 Federal 2d 613 is misplaced. (Page 174, lines 25-26)

26. Respondent excepts to the statement of the Trial Examiner that through all the time of contract negotiations

the question of wage adjustments or wage increases was given little consideration. (Page 176, lines 2-4)

27. Respondent excepts to the statement of the Trial Examiner that at all times material herein the Union was the exclusive representative of Respondent's employees within the meaning of Section 9 (a) of the Act. (Page 176, lines 9-11)

28. Respondent excepts to the statement of the Trial Examiner that Respondent made certain wage adjustments in the feed mill after the Union had claimed inequities to be existing, without consulting with the Union about such wage adjustments. (Page 176, lines 30-32; page 177, lines 1-3)

29. Respondent excepts to the statement of the Trial Examiner that Company representatives entered into negotiations with strict instructions from the President of the Company not to yield in any respect on many important conditions of employment. (Page 177, lines 3-7)

30. Respondent excepts to the statement of the Trial Examiner that these facts (excepted to in preceding exceptions) together with the disavowal of the Union, the general wage increase and the posting of the notice to the employees on November 19, 1954, comprise a totality of conduct which indicates strongly that the employer did not bargain in good faith. (Page 177, lines 7-11)

31. Respondent excepts to the statement of the Trial Examiner that the Company could have invoked (in October, 1954) the provisions of Section 9 (c) (2) (ii) and

have had the Board determine the question as to whether or not the Union could still claim the right to represent the employees in the bargaining unit. (Page 177, lines 11-18)

32. Respondent excepts to the statement of the Trial Examiner that the totality of conduct impels him to find, as he does, that Respondent engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act as alleged in the complaint. (Page 177, lines 20-23)

33. Respondent excepts to the finding of the Trial Examiner that on or about November 21, 1953 and thereafter, on October 6, 1954 and on and after November 19, 1954, Respondent refused and since the latter date at all times has refused to bargain collectively with the Union as the exclusive representative of the Respondent's employees in an appropriate unit. (Page 177, lines 25-30)

34. Respondent excepts to the statement of the Trial Examiner that Respondent's refusal to bargain collectively with the Union tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. (Page 178, lines 4-14)

35. Respondent excepts to, in its entirety, the remedy suggested by the Trial Examiner, the conclusions of law made by the Trial Examiner and the recommendations made by the Trial Examiner. (Page 178, lines 18-32; pages 179-180-181-182, lines 1-5)

36. Respondent excepts to "Appendix A" attached to the Intermediate Report in its entirety.

37. Respondent excepts to the failure of Trial Examiner to find that all evidence pertaining to any violation of the Act allegedly occurring subsequent to May 20, 1954, the date on which the charge herein relied upon was filed, was inadmissable as not supported by any charge.

38. Respondent excepts to the failure of the Trial Examiner to find that during bargaining negotiations and particularly by October, 1954, a genuine impasse had been reached between the Company and the Union.

39. Respondent excepts to the failure of the Trial Examiner to find that Respondent at all times bargained in good faith with the Union during all the period of time that there was any duty upon it to bargain.

40. Respondent excepts to the failure of the Trial Examiner to find that Respondent, by October, 1954, believed in good faith that the Union no longer represented a majority of its employees.

41. Respondent excepts and objects to the Intermediate Report in its entirety because it is so vague and indefinite that it does not apprise Respondent with any degree of certainty as to the exact findings made by the Trial Examiner on which he bases his conclusions and recommendations.

42. Respondent excepts to the failure of the Trial Examiner to find that the Regional Director had no authority to issue the complaint because appeal of Union from earlier refusal to issue complaint was not timely made and also because General Counsel did not direct

Regional Director to issue complaint as provided by the Board's Rules and Regulations.

43. Respondent excepts to all rulings of the Trial Examiner made adverse to it with respect to admissability and inadmissability of evidence.

Respectfully submitted.

GILLESPIE & GILLESPIE
Sherman, Texas

FISHER, McLAUGHLIN &
HARRISON
Paris, Texas

ATTORNEYS FOR
RESPONDENT

/s/ By J. D. McLAUGHLIN
Of Counsel

A copy of the foregoing Exceptions and Objections to Trial Examiner's Intermediate Report and Recommended Order, Record and Pleadings was mailed to each Harrison C. Thompson, Jr., Esq., Room 2093, 300 West Vickery Street, Fort Worth, Texas, Counsel for General Counsel, and L. N. D. Wells, Esq., Mullinax & Wells, I.C.T. Building, Dallas, Texas, Counsel for the Union, this 28th day of April, 1956.

REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

United States of America
Before The National Labor Relations Board

In the Matter of

Fant Milling Company
and Case No. 16-CA-752
American Federation of Grain Millers, AFL-CIO.

Fant Milling Company, Respondent in the above matter, requests permission to present oral argument to the Board in support of exceptions and objections to Supplemental Intermediate Report of the Trial Examiner. This request is presented under Section 102.46 of the Rules and Regulations of the National Labor Relations Board.

Respectfully submitted,

GILLESPIE & GILLESPIE
Sherman, Texas

FISHER, McLAUGHLIN & HARRISON
Paris, Texas

ATTORNEYS FOR RESPONDENT

/s/ J. D. McLAUGHLIN
Of Counsel

A copy of the foregoing request was mailed to each Harrison C. Thompson, Jr., Esq., Room 2093, 300 West Vickery Street, Fort Worth, Texas, Counsel for General Counsel, and L. N. D. Wells, Esq., Mullinax & Wells, I.C.T. Building, Dallas, Texas, Counsel for the Union, this 28th day of April, 1956.

DECISION AND ORDER

(Number and Title Omitted)

117 NLRB No. 168 D-232

Sherman, Texas

On March 15, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report. The Respondent also filed a brief in support of its exceptions, and the Union filed a brief in support of the Intermediate Report.[1]

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[1] The Respondent also requested oral argument. In our opinion, the record and the exceptions and briefs fully present the issues and the positions of the parties. Accordingly, the request for oral argument is hereby denied.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as consistent herewith.

We agree with the Trial Examiner's conclusion, based on all the relevant facts as shown by the record in this case, that the Respondent refused to bargain collectively with the Union within the meaning of the Act. On June 26, 1953, the Union had been certified as the exclusive bargaining representative of an appropriate production and maintenance unit of the Respondent's employees at the Sherman plant. By November 21, 1953, the date 6 months prior to the filing and service of the charge, the Respondent had held 4 separate negotiating meetings with the Union without reaching an agreement. Thereafter, up until October 15, 1954, the Respondent held about 14 more such meetings, still without reaching an agreement. Finally, at a meeting on November 19, 1954, it advised the Union that it was withdrawing recognition and refusing to meet any further. The issue before us is whether the Respondent, in this long course of dealing with the Union, fulfilled its duty to negotiate in good faith so as to justify its refusal in November 1954 to prolong the discussion of collective bargaining issues, or whether on the other hand it evaded its legal duty and was thus without warrant in November 1954 and thereafter for refusing to meet with the Union.

The course of the negotiations is disclosed in large measure by voluminous transcripts of most of the meetings, made for the Respondent by a court reporter and put in evidence by the Respondent. We have no difficulty in determining the Respondent's bad faith throughout these protracted negotiations, particularly in view of the Respondent's unilateral effectuation of a general wage increase early in October 1954, while the negotiations were still in progress but without consultation with or even notice to the Union. The record shows that the Union had been pressing for a general wage increase for some time, and at the meeting of September 17, 1954, had repeated its demand for a general wage increase and stated that it would be happy to discuss the matter further. The Respondent's negotiators replied that they would agree only to the current wages, with minor adjustments to eliminate individual inequities as between classifications.[2] Partly in view of the Union's statement at the meeting that it no longer insisted on its own proposal, which had called for a 15-cent increase, the Respondent's negotiators closed the September 17 meeting with a statement that they would try to work out a compromise on pay and would schedule another meeting for October 10.

The circumstances in connection with the intervening wage increase appear sufficiently from the admissions of Vice-President and Assistant General Manager Martin at the hearing. According to Martin, President and General Manager Fant, without consultation of any kind with the Union, in the latter part of September 1954 decided to grant a general wage increase of 7 cents per hour, and told the supervisors of his decision. On or about October 4 or 5, Chief Union Representative Wellborn sought Martin out and told him, "I hear that you have given a 7-cent raise to the employees." Martin replied, "That is correct." Wellborn then asked, "Aren't you aware that you should have contacted or told me or discussed it with me about giving the employees a raise?" Martin's reply was that 7 or 8 years before, when he was with another employer (Universal Mills), he had given raises without contacting Wellborn, and Wellborn had made no objection.[3]

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[2] To this latter suggestion the Union's answer was that it would like to defer a discussion of individual inequities pending negotiations on other, more important issues.

At the next negotiating meeting, postponed from October 10 to October 15, Wellborn again protested the Respondent's unilateral action in granting the wage increase without notice to the Union. The reply of the Respondent's negotiators this time was that the Union had said at the previous negotiating meeting, on September 17, that it was not yet ready to discuss wages except on the basis of the 15-cent increase originally proposed by the Union. Wellborn did not agree with this distortion of the facts, but said that he felt the Respondent had given the wage increase to the employees so that they would not "show up" at any further negotiating meetings, and that if the Respondent really intended to negotiate in good faith it would have discussed the wage increase with the Union or made some definite offer to the Union instead of granting the increase unilaterally. The Respondent's negotiators did not deny Wellborn's assertion that no general wage increase of any size had been offered to the Union by the Respondent. Thereafter, despite the disagreement that had arisen concerning the unilateral wage increase, the Respondent agreed to hold a further negotiating meeting.

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[3] In view of Martin's admissions, we are unable to credit his later denial on redirect examination that he or anyone else in management knew of the wage increase before October 6, when it was officially announced to the employees.

On November 19, 1954, the date which had been set for the next scheduled meeting, the Respondent posted a notice to the employees, announcing the resumption of direct dealing with the employees and the withdrawal of recognition from the Union, on the ground that it was impossible to reach an agreement with the Union, and on the further ground that "management has lately learned through statements made by various employees" that the Union had lost its majority. At the meeting with the Union on that day, the Respondent for the first time advised the Union that it was withdrawing recognition and refusing to meet any more.

The Respondent argues that the unilateral wage increase does not show that it was negotiating with the Union in bad faith, because the increase was granted only after an alleged impasse had been reached which warranted such unilateral action. The record, as set forth above, does not support this contention. It shows the opposite. Indeed, the Respondent in effect admitted that no deadlock had yet been reached, for, after having given the unilateral wage increase, it participated in one bargaining meeting and scheduled still another with the Union in an apparent attempt to continue to reach an agreement. Moreover, even assuming that an impasse had been reached, the Respondent's change of position as to a general wage increase, after having refused it to the Union at the September 17 meeting, would effectively have broken any impasse that might theretofore have existed.[4]

The Respondent also defends its unilateral action in granting the wage increase on the ground that the Union allegedly (1) had refused to bargain on wages, and (2) had consented to the increase. As set forth above, however, the record shows that when, at the previous meeting, *the Union requested* bargaining on a general wage increase, *the Respondent refused.*[5] Thereafter, as the record shows, the Respondent put into effect the general increase without consulting with or even advising the Union, thus depriving the Union of any opportunity to agree to the increase; and the Union immediately and repeatedly *protested* the unilateral manner in which the Respondent had decided on and granted it.

Finally, the Respondent argues that the wage increase does not show bad faith because it then had a *bona fide* doubt of the Union's majority. This doubt was based on certain reports made to various management officials by line supervisors, beginning about a week before Fant's decision to give the increase, and continuing for almost 2 months thereafter. These reports were to the effect that the supervisors had observed a marked decrease in the number of employees regularly wearing union buttons in the plant, and had been informed by various employees that the majority had "forgotten the union activity." However, the Respondent continued to recognize the Union's majority and to schedule negotiating meetings until it posted the notice to its employees on November 19, 1954, announcing that "management has *lately* learned through statements made by various employees" (emphasis added) that a majority no longer desired representation by the Union. And the basis it now urges for having ignored the Union's representative status for purposes of the wage increase (although not for purposes of bargaining in other respects) is no more substantial than the hearsay information given its supervisors by some of its employees. It would strain credulity to believe that these statements, amounting apparently to no more than mere opinion voiced by an undisclosed number of employees, could constitute a basis sufficient to persuade the Respondent to bypass the Union in September, when it decided to give the wage increase. Indeed, the record indicates that the Respondent itself did not rely on the reports, for at the time it announced the increase above discussed, it did not advance any alleged loss of majority as its reason for failure to consult with the Union. And 1½ months afterwards, in its November 19 notice, it admitted that it had learned only "lately" of the alleged loss of majority. In view of these facts, and upon the record as a whole, we agree with the Trial Examiner's refusal to credit Martin's testimony that the above-mentioned reports had caused the Respondent to doubt the Union's majority by the time the general wage increase was unilaterally decided upon and given.

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[4] See, for example *N. L. R. B.* v. *U. S. Cold Storage Corp.*, 203 F. 2d 924 (C. A. 5). See also *Crompton-Highland Mills, Inc.*, 70 NLRB 206, set aside 167 F. 2d 662 (C. A. 5), reversed 337 U. S. 217.

[5] The Union's request to defer discussion for more important issues was clearly limited to the Respondent's offer to make minor adjustments to eliminate individual wage inequities.

On a procedural level, the Respondent argues that evidence of any occurrence not made the subject of a timely charge, such as the unilateral wage increase of 1954, which the Respondent granted *after* the filing of the charge in this case, is inadmissible under the provisions of Section 10 (b). However, the charge previously filed in this case alleged in part that the Respondent refused to bargain collectively with the Union, and thereby and by other acts and conduct interfered with, restrained and coerced its employees in the exercise of their statutory rights. Moreover, this charge was still pending, by reason of the Union's timely request to the General Counsel to review the Regional Director's then refusal, since reconsidered, to issue a complaint on behalf of the General Counsel. In these circumstances we hold that the unilateral wage increase, although occurring subsequent to the original charge and not the subject of any amended charge, is admissible as tending to prove the allegations of the charge, as elaborated in the complaint after an investigation occasioned by the charge: to wit, that the Respondent on or about November 21, 1953, and at all times thereafter, and particularly by putting in effect a general wage increase for all employees in the unit on or about October 7, 1954, without notice to the Union, was refusing to bargain collectively within the meaning of the Act. We find support for our view in *N.L.R.B.* v. *Anchor Rome Mills, Inc.*, 228 F. 2d 775, 37 LRRM 2367, 2370, where the United States Court of Appeals for the Fifth Circuit only last year approved the holding of *N.L.R.B.* v. *Kohler Co.*, 220 F. 2d 3, 35 LRRM 2606, 2608 (C. A. 7), that the six-month limitation of Section 10 (b)

> does not prohibit the inclusion [in the complaint] of similar or related acts happening after the charge. Where, as here, the charge refers to part of a continuing pattern of conduct, there is no reas-

> on why the Board cannot allege specific acts which are part of that pattern although they occurred after the charge was filed.

We find that the earlier cases cited by the Respondent and our dissenting colleague, when carefully examined, are distinguishable: These cases concede that the complaint is *not* to be limited to the specific allegations in the charge so as to exclude other matters which are similar or related to the violation charged, and they support *our* view rather than the contrary one. Nor can we agree with the dissenting view that the later *Rome Mills* case is not apposite.[6]

We are constrained to disagree with our dissenting colleague's further view that the Board is without jurisdiction to entertain the complaint because of the alleged prejudicial action of the Regional Director in issuing it on behalf of the General Counsel. On August 12, 1955, *before* the complaint was issued, the General Counsel in effect ruled on the charging party's appeal from the Regional Director's original refusal to issue a complaint: he ratified and approved the Regional Director's decision to withdraw the refusal and to continue the investigation on the basis of additional supporting evidence. The complaint subsequently issued by the General Counsel, acting through the agency of his Regional Director, was therefore duly issued.

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[6] See *N.L.R.B.* v. *Local 1423, Carpenters*, F. 2d, 39 LRRM 2245, 2247 (C. A. 5), enforcing findings of discrimination as to two employees although they had not filed a charge within six months, where the discrimination was "closely enough related" to discrimination against another employee whose charge was timely filed; *N.L.R.B.* v. *Dallas General Drivers*, 228 F. 2d 702, 37 LRRM 2356, 2358 (C. A. 5), where the Court stated that the *Newton* case "simply held that the Board could not include in its complaint an allegedly discriminatory discharge of an employee which occurred more than six months prior to the service of the charge"; *N.L.R.B.* v. *Union Manufacturing Company*, 200 F. 2d 656, 31 LRRM 2232 (C. A. 5), where the Court held that the Board had jurisdiction over violations occurring after the filing of the last amended charge, and that the complaint properly included such matters. See also *Douds* v. *International Longshoremen's Association*, F. 2d, 39 LRRM 2388 (C. A. 2), where the Court approved the Board's request for an injunction based entirely on a refusal to bargain occurring subsequent to the charges.

Moreover, our dissenting colleague appears to agree with with us that, aside from the procedural barrier he detects, the unilateral wage increase establishes the violation alleged against the Respondent. We cannot agree with his further view that, despite the willingness of the Regional Director and the General Counsel to issue a complaint without more, the Union should have insisted on filing an amended charge in order to avoid fatally prejudicing the Respondent.

We therefore find, contrary to the Respondent's contentions, that the unilateral wage increase of October 1954 was not given during a bargaining impasse, nor was it granted pursuant to a good-faith doubt of the Union's majority status. We find rather that the giving of this general increase while negotiations were still continuing, and in complete disregard of the Union's representative status, provides the final insight into the Respondent's conduct of negotiations with the Union. It clearly shows that after November 21, 1953, the cut-off date determined by the General Counsel pursuant to the provisions of Section 10 (b) of the Act, the Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act.[7] Upon the entire record, we find that the Respondent has failed and refused to bargain in good faith with the Union and that it has thereby violated Section 8 (a) (5) and (1) of the Act. We further find that it will effectuate the policies of the Act to order the Respondent to bargain with the Union on request.[8]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fant Milling Company, Sherman, Texas, and its officers, agents, successors, and assigns:

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of all its production and maintenance employees at the Sherman, Texas, plant, excluding chemists, chemist helpers, office clerical employees, buyers, salesmen, watchmen, guards and supervisors as defined in the Act;

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[7] See *N.L.R.B.* v. *Reed & Prince Manufacturing Company,* 205 F. 2d 131, 134-135 (C. A. 1), certiorari denied 346 U. S. 887, where, as here, the employer "engaged in a lengthy series of bargaining conferences, which got nowhere." The Court, approving the finding of a refusal to bargain, held that the Board need not be blinded by mere talk and surface motions, and that the finding involved an area of mixed fact and law requiring the Board's specialized knowledge and expertness, as referred to in *Universal Camera Corporation* v. *N.L.R.B.*, 340 U. S. 474, 488. Accord: *N.L.R.B.* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 705 (C. A. 4); *American National Insurance Company,* v. *N.L.R.B.*, 187 F. 2d 307 (C. A. 5), affirmed *N.L.R.B.* v. *American National Insurance Company,* 343 U. S. 395.

[8] See the *American National Insurance* case cited above, 187 F. 2d at 309, 343 U. S. at 401. See also *N.L.R.B.* v. *Truitt Manufacturing Company,* 531 U. S. 149, reversing the contrary action of the Court of Appeals for the Fourth Circuit in denying enforcement of a similar affirmative order.

(b) Interfering in any other manner with the efforts of the aforesaid Union to bargain collectively on behalf of the employees in the appropriate unit.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of all the employees in the above described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody any agreement reached in a signed contract;

(b) Post at its Sherman, Texas, plant, copies of the notice attached hereto and marked "Appendix."[9] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall be duly signed by the Respondent and posted by it immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

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[9] In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(c) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. April 19, 1957

Boyd Leedom, Chairman

Abe Murdock, Member

Stephen S. Bean, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

On May 20, 1954, the Union filed a charge with the Board, alleging that on or about November 20, 1953, the Respondent, in violation of the Act, had refused to bargain with the Union. On July 13, 1954, the Regional Director formally notified the parties that he would not issue a complaint because "there was insufficient evidence of violations to warrant further proceedings." The Union thereupon appealed the Regional Director's ruling to the Board's General Counsel.[10] On October 1954, the Respondent put into effect a general wage increase for its employees. Thereafter, on January 24, 1955, the Regional Director announced that, "upon reconsideration of the facts and circumstances," he was withdrawing his previous refusal to issue a complaint and would proceed with the investigation of the charge against the Respondent. On August 12, 1955, the General Counsel, noting the Regional Director's action of January 24, wrote the parties that "All further inquiries with respect to the 8 (a) (5) allegation should be addressed to the Regional Director."

On August 17, 1955, the Regional Director issued the complaint herein. This complaint alleged in general terms that the Respondent had refused to bargain with the Union on or about November 21, 1953. It is significant that no amended charges were ever filed in this case, and that the only act specified with particularity in the complaint was the October 1954 wage increase.

My colleagues have concluded that the Respondent did not bargain with the Union in good faith on and after November 21, 1953. A reading of their opinion shows that the crucial element in their evaluation of the course of the Respondent's conduct is the wage increase which the Respondent gave its employees in October 1954. Thus their opinion is almost entirely devoted to a consideration of that wage increase, and they have candidly admitted that the Respondent's granting of the wage increase has given them a "final insight" into the Respondent's conduct of negotiations with the Union. My colleagues' decision appears therefore to affirm the Regional Director's decision not to issue a complaint on the basis of his evaluation of the Respondent's conduct preceding the October 1954 wage increase. And I, too, agree that but for the wage increase there would be no case whatever against the Respondent. But as this case turns on the wage increase, the critical issue is whether the wage increase — which occurred after the Union filed its charge, and which was not made the subject of a second, or amended, charge — may lawfully be made the basis of a finding that the Respondent violated the Act. In my opinion, it may not.

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[10] The Union's Request for Review was filed more than 10 days after the Regional Director served his notice of refusal to issue a complaint, and the Respondent, relying on Section 102.19 of the Board's Rules and Regulations, contends that such request was not timely filed. The only record evidence touching on the point is the statement on the face of the Union's Request for Review that the Request was filed pursuant to "an extension * * * granted July 22, 1954." As the latter statement is not controverted in the record, and as the General Counsel considered portions of the Request for Review on the merits (G.C.'s letter of August 12, 1955, disposing of the Union's appeal), I treat the Union's appeal as timely filed.

In the first place, I observe that the Regional Director's action in this case was contrary to the Board's established procedure, as set forth in the Board's Rules and Regulations and Statements of Procedure, which have been published in the Federal Register. By Section 102.19 of the Board's Rules and Regulations, the Board has formally established a procedure which affords an opportunity to an aggrieved complainant to have the General Counsel review the Regional Director's action.[11] Section 101.6 of the Board's Statements of Procedure provides that after an appeal is taken the file in the matter appealed is to be forwarded to Washington, D.C., for review by the General Counsel. Upon such review, the General Counsel may either sustain the Regional Director or may direct him to take further action.[12] The effect of these sections, in my opinion, is to divest a Regional Director of jurisdiction over the subject matter of an appeal pending the General Counsel's action.

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[11] Sec. 102.19 states:

> *Review by the general counsel of refusal to issue.* — If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

Under this view, after the Union herein had appealed the Regional Director's refusal to issue a complaint, the Regional Director was divested of jurisdiction over the subject matter of the Union's May 20, 1954, charges, and lacked the power to reconsider and withdraw his earlier action.[13] In the circumstances of this case, this irregularity and departure from orderly administrative procedure has more than technical significance. For, had not the Regional Director reversed his earlier refusal to issue a complaint, the General Counsel would have reviewed the Regional Director's decision on the basis of the facts as they existed in July 1954, and without any reference to the October 1955 wage increase. It is idle, of course, to speculate what the result of such a review would have been. From the Respondent's view, however, the real point is that the Regional Director's action precluded the General Counsel from passing upon the Respondent's conduct as the Rules and Statements of Procedure required. It is equally idle to say that had the General Counsel, upon review, sustained the Regional Director, the Union could then have filed a new charge based upon the October 1954 wage increase. For, again, from the Respondent's view, the real point is that the wage increase was never made the subject of a charge against it.

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[12] Sec. 101.6 of the Board's Statements of Procedure provides:

> *Dismissal of charges and appeals to general counsel.* — If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D. C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the general counsel with the assistance of his staff. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action.

[13] In reversing his earlier action, the Regional Director reconsidered "facts and circumstances" concerning which there then does not appear to have been a "file" for him to review, said "file" presumably having been previously sent to the General Counsel in Washington, D. C., pursuant to Sec. 101.6 *supra*. Moreover, the Regional Director presumably was not acting at the direction of the General Counsel when he reversed himself, for at that time the office of the General Counsel was vacant. (The term of General Counsel Bott terminated on December 20, 1954. His successor, General Counsel Kammholz, began his term on March 29, 1955.)

Accordingly, I am convinced that the irregular action taken in this case before the filing of the complaint was prejudicial to the Respondent's case.[14]

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[14] Section 3 (a) of the Administrative Procedure Act, 5 U. S. C. A. 1001, *et seq.*, requires an administrative agency to publish in the Federal Register its rules and "* * * statements of the general course and method by which its functions are channeled and determined * * *." It also states specifically: "No person shall in any manner be required to resort to organization or procedure not so published." The procedure followed in this case before the filing of the complaint clearly, I believe, violated the latter prohibition of Section 3 (a).

Administrative rules and regulations have the force of law and are binding on the Government. Their non-observance by the administrative authority, which is bound by such rules and regulations, invalidates an entire proceeding. *Sibrary* v. *United States*, 282 F. 795, 797 (3rd Cir.); *United States* v. *Dunton*, 288 F. 959 (S. D. N. Y.); *Ohm* v. *Perkins*, 79 F. 2d 533 (C. A. 2); *Bilokumsky* v. *Tod*, 263 U. S. 149, 155. Moreover, a departure from the rules and regulations may not be justified simply by saying the departure is unimportant. *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43 (C. A. D. C.). See also *Accardu* v. *Shaughnessy*, 347 U. S. 260; *Bridges* v. *Wixon*, 326 U. S. 135.

Notwithstanding the foregoing, however, I rest my dissent in this case on a second ground — the dictate of Section 10 (b) of the Act.[15]

The Courts of Appeals for the Seventh and Fifth Circuits have held respectively, in the *Indiana Metals* and *Newton* cases, that Section 10 (b) precludes the finding of an unfair labor practice predicated on acts that occurred subsequent to the filing and serving of a first charge and more than 6 months prior to the filing and serving of an amended charge, even though the acts in question were similar to those alleged in the charges.[16] In language which was quoted with approval in the *Newton* case, the Court said explicitly in the *Indiana Metals* case:

> The Board is barred under Sec. 10 (b) of the Act from enlarging or adding to the language of the charge so as to include unfair labor practices committed more than six months prior to the filing and serving of the charge.

In the instant case, the Respondent's October 1954 wage increase occurred about 5½ months after the charge was filed, and almost 10 months before the complaint issued. The October wage increase — which according to the majority is the nub of the case against the Respondent — was never made the subject of a second or amended charge. Accordingly, even if the complaint herein be regarded as a substitute for such a second or amended charge, the Board is, by virtue of Section 10 (b), and under the holdings of the *Indiana Metals* and *Newton* cases, precluded from predicating a violation of the Act on the basis of that October wage increase.[17] This conclusion is impelled by the language of Section 10 (b) for, as the Court said in the *Newton* case, "Without the limitation, we have placed on Section 10 (b) of the Act, its provisions would be rendered meaningless to a great extent."

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[15] Section 10 (b) provides in pertinent part: "* * * *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *.

[16] *Indiana Metals Products Corporation* v. *N.L.R.B.*, 202 F. 2d 613, 619 (C.A. 7); *N.L.R.B.* v. *Newton*, 214 F. 2d 472, 475 (C.A. 5).

In view of the foregoing, I would not find here that the Respondent has violated the Act.

Dated, Washington, D. C. April 19, 1957

Philip Ray Rodgers, Member

NATIONAL LABOR
RELATIONS BOARD

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[17] My position in this case follows the Board's ruling in the recent *Knickerbocker Manufacturing Company* case, 109 NLRB 1195, 1197, where the Board specifically rejected the view that the filing of a charge tolls the running of the 10 (b) limitation so as to permit adjudication of any and all subsequent labor practices. Accord: *Mid States Steel and Wire Company*, 112 NLRB 800.

N.L.R.B. v. *Anchor Rome Mills, Inc.*, 228 F. 2d 775 (C.A. 5), here relied on by my colleagues, is distinguishable from the instant case. In the *Rome Mills*, case, the conduct in issue was "a series of discriminatory acts" named in the charge to have occurred "on, before, and after" dates specified in the charge, as well as other acts and conduct that occurred within the 6 months preceding the date of the charge. The *Rome Mills* case does not appear therefore to be apposite. Moreover, the *Kohler* case, 220 F. 2d 3, as well as the other cases cited by my colleagues, are also distinguishable: each of them involved, as any careful reading of them will show, a factual situation clearly different from that which exists in this case.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT refuse to bargain collectively with AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO, as the exclusive representative of all our employees in the appropriate unit described below.
>
> WE WILL NOT in any other manner interfere with the efforts of the aforesaid Union to bargain collectively on behalf of the employees in the unit described below.
>
> WE WILL upon request bargain collectively with the aforesaid Union as the exclusive representative of all our employees in the unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody any agreement reached in a signed contract.
>
> The bargaining unit is:
>
> > All production and maintenance employees at our Sherman, Texas, plant, excluding chemists, chemist helpers, office cler-

ical employees, buyers, salesmen, watchmen, guards and supervisors as defined in the Act.

FANT MILLING COMPANY
(Employer)

Dated ____________ ______ By ____________________
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

IR-851
Sherman, Texas

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

On May 20, 1954, the American Federation of Grain Millers, affiliated with the American Federation of Labor[1] (hereinafter sometimes called the Union), filed a charge against the Respondent, Fant Milling Company, (hereinafter sometimes called the Company), asserting that the Company had engaged and is now engaging in certain unfair labor practices in violation of Section 8 (a), subsections (1), (3) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136-162[2] hereinafter called the Act. On the basis of the charge so filed, the General Counsel of the National Labor Relations Board instituted this proceeding under Section 10 (b) of the Act by causing a complaint to be signed and issued by the Regional Director for the Sixteenth Region on August 17, 1955, against the Company, alleging contraventions of Section 8 (a), subsections (1) and (5) of the Act.

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[1] **After this case was begun, the American Federation of Labor and the Congress of Industrial Organization merged into one; the Trial Examiner on his own motion now amends the name of the charging party and the style of the case, by changing "AFL" to "AFL-CIO."**

In substance, the complaint herein alleges that on or about November 21, 1953, the Union, after being duly certified by the Board as the representative of employees in an appropriate bargaining unit[3] requested the Company to bargain collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment; that on or after that day the Company refused and continues to refuse to so bargain; and that the Company, without notice to the Union as the representative of the employees in the collective bargaining unit, on or about

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[2] The Regional Director, exercising the discretion conferred upon him, decided after investigation that that part of the charge alleging contravention of Section 8 (a), subsection (5) of the Act, was not well founded. Upon petition by the Union for review of the decision of the Regional Director, the General Counsel reversed the decision of the Regional Director in this respect. There has been no issue presented under the complaint in this case under Section 8 (a), subsection (3), with respect to any unlawful discharge in violation thereof.

[3] NLRB Case No. 16-RC-1289, unreported.

October 7, 1954, put into effect a general increase in wages for all employees in the bargaining unit.[4]

The Company filed timely answer, denying the contraventions of the Act as set forth in the complaint, and setting up certain affirmative defenses; — mainly, that on different occasions, and particularly on September 17, 1954, the Union refused to bargain or engage in any discussion concerning wages; that theretofore the Union had consistently refused to seriously discuss or to negotiate an agreement on wages; and that "throughout the period of its bargaining with the complaining union and for many months prior to October 7, 1954, Respondent stated in substance that its desire and position with reference to wages was that the employees at its plant should receive wages equal to or above wages received by persons similarly employed in the area of Sherman, Texas, and that on October 6th, 1954, it had been informed and upon information believed that a general increase of 7c per hour was necessary in order to sustain such position and on such date announced such general wage increase to be effective as of October 4th, 1954."; and that the Union approved the wage increase.

At the hearing session held on November 30, 1955, the Trial Examiner allowed the Respondent to amend its answer by adding the following affirmative defense:

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[4] The bargaining unit is described as "all production and maintenance employees of Respondent employed at its Sherman plant, exclusive of chemists and chemists' helpers, office clerical employees, buyers, salesmen, watchmen, guards and supervisory employees."

"Paragraph 5. Respondent alleges that on or about November 19, 1954, and prior thereto, a genuine impasse was reached by the union and the employer in contract bargaining negotiations, neither being willing to give up its position on each and all of these bargaining subjects:

> "(a) A no-strike and no-lockout clause providing for penalty for violation in favor of the non-offending party against the offending party.
>
> "(b) Providing for arbitration in the contract.
>
> "(c) A provision in the contract that continuous service should control promotions, demotions, lay-offs and recall of employees instead of ability to do the work on the job involved.

"That by reason of such impasse and deadlock, further bargaining negotiations between the parties were futile and no obligation existed on the part of the employer to continue bargaining negotiations with the Union."

This matter came on to be heard before the undersigned Trial Examiner at Sherman, Texas, on September 20, 1955, and thereafter on September 27, 1955, was adjourned *sine die*. The hearing was reopened pursuant to appropriate order on November 15, 1955, and was closed on December 1, 1955. At the hearing, all parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence relevant to the issues, to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law.

At the opening of the hearing, counsel for the Respondent objected to the proceeding on the grounds that the Board had not, insofar as the Respondent was concerned, designated the undersigned Trial Examiner as the Trial Examiner to conduct the hearing; that is, that the Respondent had had no notice whatsoever of any designation of any Trial Examiner for the hearing. In support of the objection, it was contended on behalf of the Respondent "that the parties are entitled to be apprised of the designation of the Trial Examiner to conduct the hearing under the provisions of the Act and therefore we make the objection at this time." The Trial Examiner had been duly designated by the Chief Trial Examiner to hear the case and therefore overruled the objection.[5]

Prior to the opening of the hearing, the Company, by counsel, filed a motion to dismiss the complaint and a motion to strike. Each of these motions, made in writing, was denied by Trial Examiner Alba Martin, with leave to renew at opening of the hearing. These written motions were renewed at the hearing, and counsel for the Respondent also moved for a bill of particulars in respect of the allegations of the complaint that the Union requested the Respondent to bargain collectively and that on or about November 21, 1953, and at all times thereafter, the Respondent did refuse and continues to refuse to bargain collectively with the Union. The Trial Examiner deferred ruling on any one of these motions at the time made.

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[5] It is provided in the Rules and Regulations of the Board, series 6 as amended, 12 F. R. 5656, 13 F. R. 4872, compiled and published in the Federal Register and effective June 3, 1952:

HEARINGS

SEC. 102.34 *Who shall conduct, to be public unless otherwise ordered.* — The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner, Washington, D.C., or the associate chief trial examiner, San Francisco, California, as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the trial examiner.

The motion to strike, subject to the motion to dismiss, is based principally upon the assertion that the charge filed by the Union before the issuance of the complaint herein does not support the allegations of the paragraphs of the complaint objected to because it is "not pursuant to any charge served upon Respondent within the meaning and contemplation of . . . [Section 10 (b)] of the Act." In support of its motion to dismiss, the Respondent takes the position that the charge alleges that "on or about November 20, 1953," the Respondent refused to bargain collectively with the Union, whereas the complaint alleges that the acts complained of, that is, the Respondent's refusal to bargain with the Union after the request on or about November 21, 1953, cannot be supported by the content of the original charge. The position of the Respondent in this connection is not well taken, and its motion to strike the particular paragraphs of the complaint referred to is hereby denied. The charge is within the requirements of Section 10 (b) of the Act, and the complaint follows the allegations of the charge. Cf. *Cathey Lumber Company*, 86 NLRB 157, 159, *et seq.* and *Knickerbocker Mfg. Co., Inc.,* 109 NLRB 1195, 1197.

The motion to dismiss the complaint is stated on several grounds. First it is said that the complaint is not based upon any charge verified or sworn to as required by Section 120.11 of the Rules and Regulations of the Board, series 6, as amended. An examination of the original charge filed herein on May 20, 1954, discloses that this assertion is not well founded. As further grounds in support of the motion, it is alleged that there is no affirmative allegation in the complaint that it is issued pursuant to a charge made by a labor organization with an affidavit on file with the Board executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization as required by the Act; that there is no affirmative allegation that the charging union prior to the filing of the charge and issuance of the complaint filed with the Secretary of Labor copies of the constitution and bylaws in a report as required by the Act; and that there is no affirmative allegation in the complaint that the charging union has complied with Section 9 (h) of the Act. Section 9 (h) provides that:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each

> officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal Code shall be applicable in respect to such affidavits.

The position of the Respondent in these respects is not well taken. The question of fact attempted to be raised as a question of law is a matter for the Board's own administrative determination and is not a matter which the Respondent is entitled to raise and litigate in an unfair labor practice proceeding. *N.L.R.B.* v. *Vulcan Furniture Manufacturing Corporation,* 214 F. 2d 47, 55 (C.A. 5) cert. den. 348 U. S. 873; *American Rubber Products Corp.* v. *N.L.R.B.,* 214 F. 2d 47, 55 (C.A. 7); Nineteenth Annual Report of the National Labor Relations Board, pp. 10-12; *Pasco Packing Co.,* 115 NLRB No. 74. Had the Respondent offered to prove noncompliance at the hearing, a different question would have been presented. *N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville,* U. S. Sup. Ct., No. 79, October 1955 term, February 27, 1956. Further in support of its written motion to dismiss, the Respondent asserts that the complaint and exhibit (the charge) made a part thereof show that such complaint is purportedly based upon a charge filed May 20, 1954, by an international representative of the Union, wherein the sole charges and affirmative allegations claiming unfair labor practices within the meaning of Section 8 (a) (1), (3) and (5) of the Act only are (in substance) these: That the Respondent on or about November 20, 1953, refused to bargain collectively with agents of the Union and that Respondent discharged certain named employees on April 23 and 24, 1954, because of their membership and activities in behalf of the Union; and that by said acts and other acts the Respondent restrained, interfered with and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act; and that there is no allegation in the charge that the Respondent at any time subsequent to on or about November 20, 1953, refused to bargain collectively with the Union as the bargaining agent of its employees; that there is no allegation in the charge with reference to the Respondent having put into effect a wage increase for employees within the bargaining unit; that the complaint in its entirety is based upon the alleged refusal of the Respondent to bargain with the Union on or about November 21, 1953, and at all times thereafter, not on or about November 20, 1953; that the allegation (illegible) that the Respondent on or about October 7, 1954, without notice to the Union put into effect a general wage increase for all employees in the unit and that these allegations do not constitute an enlargement of allegations in the charge but are new and different charges against the Respondent neither embodied in nor contemplated by the one charge filed May 20, 1954. Respondent further asserts that the complaint is insufficient to authorize the making of any order by the Board against the Respondent, and that the complaint is an independent action of the Board not authorized by the Act.

The complaint is sufficient on its fact, and the several grounds in support of this motion to dismiss set forth above are not well taken. *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2), enforcing 96 NLRB 1436; *N. L. R. B.* v. *Union Manufacturing Company*, 200 F. 2d (C.A. 5), enforcing 95 NLRB 792; *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, (C.A. 9); *Cathey Lumber Company, supra.* This motion to dismiss, on the grounds stated, is denied in its entirety. During the course of the hearing, the Respondent made various other motions to dismiss, which are disposed of in accordance with the determinations below.

The motions of the Respondent for bills of particulars made during the course of the hearing need not be resolved herein, because of stipulations entered into by and between counsel for the several parties during the course of the hearing.

Upon the entire record in the case, from his observation of the witnesses and after examination of all the exhibits and careful consideration of arguments and briefs, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondent

The Respondent, Fant Milling Company, is and has been at all times material hereto, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 408 East King Street in the city of Sherman, Texas, and is now and has been at all times herein mentioned, continuously engaged at said place of business in the milling of flour and similar products from grain and in the manufacture and sale of baking powder, mixed feeds, cake mixes and related products. The Respondent also maintains a plant at Gainesville, Texas, and distributing warehouses at various other cities in the State of Texas. The Respondent, in the course and conduct of its business operations at Sherman, Texas, during the twelve-month period ending December 31, 1954, which period is representative of all times material hereto, purchased in excess of $10,000,000 worth of raw materials, consisting principally of grain, of which more than $2,000,000 worth was shipped in interstate commerce to the Sherman, Texas, plant of the Respondent from points outside the State of Texas. During the same period, the Respondent ~~sold products consisting principally of flour,~~ mixed feeds, baking powder, cake mixes and related products valued in excess of $10,000,000, of which more than $2,000,000 worth was shipped in interstate commerce from its Sherman, Texas, plant to points outside the State of Texas.

The Respondent is engaged in commerce within the meaning of the Act.

II. The labor organization involved

American Federation of Grain Millers, AFL-CIO is a labor organization within the meaning of Section 2 (5) of the Act.

III. The alleged unfair labor practices

Preliminary Findings

Pursuant to an order of the Board, an election among the employees in the designated bargaining unit was held on June 19, 1952, to determine whether or not the employees desired to be represented by the Union for the purposes of collective bargaining. The results of the election showed that 94 eligible employees out of 179 voted for the Union; on June 26, 1953, the Union was certified as the exclusive bargaining agent of the employees in the unit specified in the Board order. Immediately after the election, on the day it was held, Roy O. Wellborn, international vice president of the Union, on behalf of the Union, requested that the Company begin negotiations looking forward to a collective bargaining agreement. Wellborn was then informed by representatives of the Company that they would not be available, due to prior commitments, during the month of July. On August 2, 1953, Wellborn directed a letter to Fred Honea, executive vice president of the Company, requesting a meeting for August 13, 1953.

On August 13, 1953, Wellborn, with five or six employees constituting a committee of the Union, met with Honea and V. I. Martin, executive vice-president and vice president, respectively of the Company, at the Company's offices at Sherman. At that meeting Wellborn presented the company representatives with a proposed collective bargaining agreement consisting of some 52 numbered paragraphs. The meeting lasted for perhaps an hour and a half during which time Wellborn went through each paragraph of the proposed agreement. At near the end of the meeting Wellborn requested from the Company a list of its employees, their seniority dates, a list of departments in the plant, and a list of the classifications and wage rates of the employees in the several departments. He was informed that the Company had no records showing seniority dates of many employees; he was supplied with a partial list of departments within the Sherman plant. After some general discussion, principally concerning procedures to be followed in trying to determine the seniority of employees it was agreed that the parties would meet again on August 27. The meeting scheduled for August 27 was postponed to September 3 at the request of the Company and, again at the Company's request, to September 5, 1953.

At the September 5 meeting, C. H. Gillespie, Jr., an attorney for the Company, entered negotiations for the first time. This meeting was held at his offices in Sherman, as were all subsequent meetings, mentioned below; Martin was with him, also representing the Company. Wellborn was spokesman for the Union, he being accompanied by the union committee, employees of the Company. Because Gillespie had just entered the scene, it was necessary to review the union proposals for his benefit, and as a consequence the net result of that meeting was about the same as the one of August 13. The Union mildly objected to the presence of a court reporter, who was there to take stenographic notes of what was said at the meeting. Gillespie objected to the preamble of the Union's proposal which mentioned "Local 64" as being a party to the contract because he did not want employees of other employers, members of Local 64, sitting in on contract negotiations, and Wellborn agreed that none other than employees of the

Company would serve on any union committee during bargaining.[6] A number of other of the paragraphs of the Union's proposal were discussed and generally objected to and criticized by Gillespie, speaking for the Company. Among the matters discussed at the meeting were these:

The Company would neither then accept nor reject the request of the Union for a payroll deduction of union dues (checkoff), and suggested that if it did agree, the checkoff should be revocable at any time; the Company expressed opposition to the request of the Union for payment of wages at overtime rates (time and one-half) for hours worked in excess of eight in any one day; and there was general discussion concerning staggered workweeks, Sunday work, the granting of a sixth paid holiday, and holiday pay at premium rates. This meeting was adjourned with a definite date set for another meeting. After an exchange of correspondence, the next meeting finally was set for and held on September 26, 1953.

After demand for a bill of particulars by counsel for the Respondent made at the hearing, it was stipulated between the parties (in lieu of a bill of particulars) that on and after September 26, 1953, a number of meetings were held in the offices of Gillespie & Gillespie, attorneys for the Company, in Sherman, Texas, during which meetings representatives of the respective parties discussed certain provisions to be incorporated into a collective bargaining agreement. The dates, together with the representatives of the Respondent who were present at each of these meetings, it was stipulated, were as follows:

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[6] Local 64 is comprised of employees of other grain milling plants in the area; employees of the Company would become members of Local 64 after appropriate action by the parent body.

September 26, 1953 —
Gillespie, Honea, Martin, and O. B. Fisher (an attorney representing the Company.)

November 12, 1953 —
Company representatives, Gillespie, Fisher, and Martin.

December 9, 1953 —
Company representatives, Gillespie, Fisher, Honea, and Martin.

January 8, 1954 —
Company representatives, Gillespie, Fisher, Honea and Martin.

April 2, 1954 —
Company representatives, Gillespie, Fisher, Honea and Martin.

April 8, 1954 —
Company representatives, Gillespie, Honea, Martin and Fisher.

April 22, 1954 —
Company representatives, Gillespie, Honea, Fisher and Martin.

May 6, 1954 —

Company representatives, Gillespie, Fisher, Honea and Martin.

May 20, 1954 —

Company representatives, Gillespie, Fisher, and Martin.

June 11, 1954 —

Company representatives, Gillespie, Fisher, and Martin.

July 2, 1954 —

Company representatives, Fisher, Gillespie, and Martin.

July 16, 1954 —

Company representatives, Gillespie, Fisher, and Martin.

July 30, 1954 —

Company representatives, Gillespie, Fisher, Honea and Martin.

August 27, 1954 —

Company representatives, Gillespie, Fisher, and Martin.

September 17, 1954 —

Company representatives, Gillespie, Fisher, and Martin.

October 15, 1954 —
Company representatives, Gillespie, Fisher, and Martin.

November 19, 1954 —
Company representatives, Gillespie and Fisher.

At each of these meetings either Wellborn or Ralph Cox, an international representative of the Union, or both of them, led the negotiations on behalf of the Union; a committee, usually four or five men, employees of the Company, also were present at each meeting except the one held on October 15, 1954, when only Wellborn was there. On April 2, 1954, at the request of the Union, Commissioner T. F. Morrow, of the Federal Mediation and Conciliation Service, was present; he appeared thereafter at the meetings held on April 8, May 6, May 21, July 2 and July 16, 1954, in an effort to assist the parties in reaching agreement.

A court reporter was present and made a stenographic record of each meeting, later transcribed. The transcript of each meeting was received in evidence at the hearing, pursuant to the following stipulation between counsel for the parties:

> MR. THOMPSON (for the General Counsel):
> In connection with the exhibits identified on the record previously, General Counsel would like to propose the following stipulation:
>
> It is hereby stipulated and agreed by and between counsel for the respondent, counsel for the

charging union and counsel for the General Counsel that Respondent's Exhibits 3 through 20 for identification, such exhibits being transcripts of negotiation meetings between the respondent and the union, were obtained by the respondent and submitted to the union and to counsel for the General Counsel. Further, that if the reporters who were present and recorded said meetings were called as witnesses in this proceeding, said reporters would testify that these transcripts were made by them from their recordings and constitute a complete transcription to the best of their ability and skill. Further, that said transcripts are substantially correct.

MR. WELLS: (for the Union):

As we indicated off the record, we are agreeable to the stipulation except for the last sentence, namely "Further, that said transcripts are substantially correct." We do not agree to that.

MR. FISHER: (for the Respondent):

Respondent accepts the stipulation in its entirety and only in its entirety.

TRIAL EXAMINER:

The stipulation, then, as between counsel for the General Counsel and counsel for the Respondent as offered by counsel for the General Counsel, is received as a stipulation between all the parties, with the modification suggested by Mr. Wells on behalf of the union.[7]

The Trial Examiner has examined the some 1500 pages of transcripts covering the negotiations between the parties in an effort to determine whether (1) the Company, on its side, entered into the negotiations with a preconceived plan or a later-conceived plan to only go through the motions of apparent bargaining with no intent to reach final agreement with the Union; or (2) whether the Union was unreasonable in its demands and its refusal to yield on its main requests presented to the Company; or (3) the parties reached a point whether further *bona fide* discussions on disputed matters would necessarily lead to a dead end. The Trial Examiner, in reaching the findings and conclusions set forth below, had considered the testimony given by Wellborn, Cox and Martin (each a credible witness), in connection with the positions of the parties over the bargaining table, as reflected by the writted record. It certainly is neither the duty nor the province of the Trial Examiner to determine the merits of proposals and counterproposals advanced during the give-and-take of collective bargaining between union and employer;[8] however, it here is his responsibility to make a finding as to whether or not the Company did refuse and continues to refuse to bargain collectively with the Union, and to decide in the first instance whether the wage increase put into effect by the Company amounted to an unfair labor practice. It seems necessary, therefore, to review the history of bargaining between the parties as reflected by the written record of the negotiations between the parties, the testimony taken at the hearing, and the pleadings herein.

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[7] The transcript reporting the meeting of May 6, 1954, previously had been offered and received in evidence.

[8] The Act does not mean that the Board is empowered to regulate hours, wages or working conditions of employees; these conditions may be as bad as the employees may tolerate or as good as they can obtain through collective bargaining. The Act does not fix nor does it authorize anyone to fix generally applicable standards for working conditions. See *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen*, 318 U. S. 116.

Resume of bargaining meetings:

September 26, 1953.

It was again agreed, as at the prior meeting, that the parties understood that any agreement made on particular paragraphs or clauses of a proposed agreement would be tentative, and subject to a full agreement being made. There was a general discussion covering the first 30 paragraphs of the Union's proposed agreement.

November 12, 1953.

Representatives of the Company presented proposals in the form of a draft agreement, which the Union promised to study; the parties then reverted to a discussion of clauses in the Union's proposed contract, including clauses covering the duration and termination of a contract. The position of the Company regarding the handling of grievances, and its opposition to a provision for arbitration, was debated. Job classifications were discussed.

December 9, 1953.

The parties discussed the proposal of the Company, particularly the right of the Company to make wage increases according to its sole discretion, and the clauses defining seniority in the making of promotions; an apparent agreement was reached covering the use of a bulletin board by the Union. The union request for arbitration of grievances as a final step in the grievance procedure ended in disagreement, the Company insisting that determination of a grievance should, if necessary, be finally made by the president of the Company.

January 8, 1954.

A general discussion on seniority pointed up the union request that in the event of promotions, recalls after layoffs, and so on, the employee having the longest service should have first right to the job, and that his qualifications to do the work should be a secondary consideration; on the other hand, the Company maintained that qualification for the job should come first in determining whether a senior man was entitled to the job. It was agreed that proposed provisions covering vacations, management rights, regular workweek, "no-strike, no lock-out," and the work of truck-drivers, would be rewritten pending a next meeting.

January 26, 1954.

Revised proposals covering regular workweek, staggered workweek, shift differentials in hourly pay rates, "no-strike, no lock-out" clauses, penalty clauses for contract breach, and the preparation of a seniority list were gone over, without agreement on any, except an apparent agreement on the definitions of workweek, Messrs. Cox and Fisher to rewrite the clause, and a qualified acceptance by the Company of an 8 cents and 6 cents instead of an 8 cents and 5 cents per hour shift differential.

April 2, 1954.

Commissioner Morrow appeared, and there was a review of what previously had been agreed to and what was not — also discussion on a rewrite of the workweek clause, seniority and promotion and callbacks, probationary employees, vacations, and grievance procedure.

April 8, 1954.

This meeting was mainly devoted to a review of certain contract clauses as rewritten by Mr. Fisher, and to provisions concerning wage rates and job classifications.

April 22, 1954.

At this meeting, the Company stated again its position on a no-strike provision and on arbitration — it demanded a penalty clause in the event of an illegal strike, and refused to agree to arbitration by a third party of differences arising under a contract. Pay rates for new female employees, seniority, vacations, management rights, pay after reporting in and no work, daily overtime as against overtime for hours worked over 40 in a workweek; the possibility of and the Union's opposition to a staggered workweek, and holiday pay, were debated.

May 6, 1954.

Mr. Gillespie summarized the April 22 meeting; there followed some discussion concerning call-in and reporting time as applicable to truckdrivers and others. Most of the emphasis of the meeting was placed on the grievance procedure as proposed by each party, Mr. Wellborn contending that to make the president of the Company the final arbiter would not give the Union any right of appeal, and

Mr. Gillespie asserting that in such case the grievance if justified could be taken into court.

May 21, 1954.

The Company presented a wage clause, and the Union objected to the proposed unilateral right of the Company to raise and lower wages, at which the Company pointed out a provision in the proposal which would give the Union the right to terminate the contract should the Company reduce wages. The Union requested a 15 cents per hour general increase in wages, which the Company impliedly refused to consider as a serious demand. Mr. Cox for the Union, without making a direct offer, suggested that the Company consider restricted arbitration, limited to discharge cases. Seniority, job classifications and differentials in pay, and the Company's request for a penalty clause in a "no-strike" provision, were touched upon.

June 11, 1954.

The Union again voiced its request for provision for arbitration of all grievances, and refused to concede the right to the Company to grant unilateral wage increases. Seniority and promotions, and classifications were discussed. On the points at issue, the Union stood firm, and the Company refused to yield without some suggestion of compromise from the Union.

July 2, 1954.

After a summary of the meeting of June 11, a discussion ensued concerning the right of the Company to make individual merit increases without consulting the Union. Prior agreements and disagreements were reviewed; Mr. Wellborn was charged with the drafting of a new management clause; and the Company was reminded that it had not supplied a seniority list. Mr. Cox read a clause covering the hours of work of truckdrivers, not agreed to; argument was resumed over the form of the management rights clause; and the Company refused to write into a contract any provision establishing vacation rights for employees, asserting that it intended to continue its vacation policy if possible.

July 16, 1954.

The Union presented a rewrite of provisions intended to cover seniority, which was refused by the Company. Consistent with its prior position, the Company maintained that it will recognize seniority, that with respect to layoffs, promotions, demotions and recalls, seniority should mean continuous service combined with ability to do the work; — just as consistently, the Union says that seniority should mean length of continuous service, and that the senior man is entitled to the job until it is shown that he is unable to properly perform the work. In this connection the parties at this meeting debated what ought to happen if a senior man failed to report to work on notice, and other situations where he might lose his seniority.

July 30, 1954.

The debate over seniority provisions as proposed by each party was continued, without result. In connection with the proposals to govern the handling of grievances, gone into at some length, the Company again firmly rejected arbitration as a final step, and insisted that the president of the Company or any designee of his from top management would settle any grievance impartially and objectively.

August 27, 1954.

The Company again stated its position on seniority, and a long discussion followed: the Company wanted "discharge for cause," "demotions" and "promotions" tied in with seniority rights, while the Union wanted these subjects separately handled; with respect to discharges for "just cause," the Union wanted, in the seniority provision, a clause affirmatively showing that an employee would know that he would not lose seniority when fired without just cause, while the Company wanted to retain the right to fire for what in its discretion would be just cause. It was agreed by Mr. Wellborn that he would rewrite an arbitration clause.

September 17, 1954.

Lack of agreement on the arbitration of grievances, a general wage increase of 15 cents per hour or negotiation for a lesser general increase after agreement on other contract provisions, provisions for a penalty clause in the event of illegal strike or lockout, pay during jury duty by an employee, and pay for overtime in a day, is apparent from the record of the meeting of this day. The Company indicated that it was willing to write into a contract a provision to the effect that it would do its best to continue its policy of granting a vacation of 1 week per year, but would not agree to more.

October 15, 1954.

The general wage increase of October 7, made by the Company, and Wellborn's request for an explanation of why the increase was put into effect without notification to the Union, or advice to him; talk with respect to the "no-strike" and arbitration clauses as proposed by each party;

and Wellborn's request for a seniority list, constituted the important matters discussed at this meeting.

November 19, 1954

At this meeting, Messrs. Gillespie and Fisher represented the Company, and Mr. Wellborn and one committeeman were present for the Union. The Company in effect said that in view of failure of the Union to make any effort to agree to the main points at issue, it felt that further negotiations would be fruitless, and that it therefore would not continue bargaining negotiations; the Union in turn in effect said that the Company had refused anything other than its own terms before it would make an agreement. The Company in substance said it was informed, and believed, that the Union no longer represented a majority of the employees in the bargaining unit, and therefore it was no longer under obligation to deal with the Union. The Union replied that it believed it still represented the employees in the bargaining unit.

The Testimony:

Wellborn and Cox, as the first witnesses at the hearing, undertook under examination by counsel for the General Counsel and counsel for the Union, and under cross-examination and on voir dire, to relate the history of collective bargaining between the Union and the Company as representative of the employees of the Company in the described unit. Each of them had fair memory, considering the lapse of time between the first negotiation meeting in 1953 and the time they were called to testify at this hearing; each had made his notes during or almost after the meetings with company representatives; and it appears from the transcript of the negotiation meetings, that each testified honestly and according to his best recollection. The Trial Examiner is satisfied that the written record of those meetings is substantially accurate, and is not in conflict with the testimony of either Wellborn or Cox, so that it appears unnecessary to comment upon the facts related by them at the hearing. Their participation in negotiations and their efforts on behalf of the Union, as shown by written record, substantiate generally what was testified to by them at the hearing.

Vice President Martin testified, on behalf of the Company substantially as follows: Before assuming a position with the Company in March 1930, he served as executive vice president and assistant general manager, and as president of Universal Mills at Fort Worth, Texas; he has known Wellborn and Cox since the year 1945, through having engaged with them in union contract negotiations and having entered into a collective bargaining agreement in the fall season of that year (he on behalf of Universal Mills and they on behalf of the Union); that on or about January 26, 1953, he was employed by the president of Fant Milling Company; and that prior to this employment he saw Wellborn once or twice or possibly more during a contract year. He said further that as vice president and assistant general manager of the Company he acts as assistant to the president, having the corporate duties of a vice president; that after the election of the Union as bargaining representative[9] he and Honea met with Wellborn and a union committee in August 1953, at which time the proposed union agreement was discussed; that James A. Fant, the president of the Company, at no time was present at this or subsequent meetings with the Union; and that after the first meeting in August between him with Honea and Wellborn and the union committee, a meeting was held in Fant's office at which time Fant designated Messrs. Gillespie and Fisher, as attorneys for the Company, with Martin and Honea, to negotiate a workable contract fair to both the Union and the Company; and then Fant expressly told them that he would not sign a contract that contained (1) an arbitration clause, (2) a no-strike and no-lockout clause where no penalty was attached (for breach by either party); and (3) that he would not accept seniority as the sole governing factor in making promotions, demotions, recalls or layoffs. It further appears from Martin that Fant's instructions were not plainly stated to the union representatives as being the instructions of Fant, but Wellborn was informed that, on these issues, the representatives of the Company had taken an irrevocable stand. This witness testified, too, that just before the meeting between the Company and the Union in the month of September 1954,[10] he had received information, from the elevator superintendent, Claude Atnip, that the employees no longer desired to be represented by a union; that after the meeting with the Union on September 17, representatives of the Company determined, from close questioning by them of supervisory personnel, that the information given to Martin by Atnip was true, and that the employees were no longer interested in union activity. The supervisors, other than Atnip, who were questioned on the point, according to Martin, were Ben Blackburn, general superintendent, and

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[9] Case No. 16-RC-1289.

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[10] Evidence offered through the testimony of Martin, as to the numbers of union buttons worn by employees at various times, as showing loss of membership, was rejected.

Johnny Koon and Ralph Robertson, cosuperintendents of the feed mill. Martin confirmed the company view that Wellborn for the Union was adamant in his position regarding arbitration, seniority, and other points at main issue. He said that on or about October 4 or 5, 1954, in a conversation with Wellborn, the latter expressed a willingness that a 7 cents per hour wage increase would be accepted as authorized by Fant, except that he (Wellborn) should first be consulted, and that, when Martin had told him "Roy, I have increased wages at plants before without consulting you and had no objection," Wellborn made no objection to the contemplated wage increase, later announced on October 7.[11] Adjustments in pay in job classifications, put into effect in April 1954, were, Martin said, made effective after discussion with union representatives.

In substance, it appears from the testimony of Wellborn, Cox and Martin, that after discussions with the Union, but without prior notice to the Union, the Company did in April 1954, make certain revisions in its pay scale; and that in October 1954, without formal consultation with or communication to the Union, did make a general wage increase of 7 cents per hour to those employees within the bargaining unit. On October 6, 1954, the Company posted a notice — "Pay Bulletin" — announcing the general wage increase. The Union had not been consulted concerning the form of the notice or its posting.

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[11] The transcript covering the negotiation proceedings for October 15, 1954, shows that Wellborn demanded from the Company an explanation as to why the wage increase was put into effect without notification to the Union.

The following notice was posted by the Company under date of November 19, 1954, signed by Jas. A. Fant, president:

"To Our Employees:

> For more than a year your Management attempted to negotiate a contract with the Grain Millers' Union in line with the election held in this plant in 1953.
>
> It is impossible to reach an agreement with the Union which Management felt was fair to the Company and to its employees, and which would permit continued efficient operation of the Company for its stockholders and for its employees.
>
> Management has lately learned through statements made by various employees, that the majority of its employees no longer desire to be represented by the Union in all matters concerned with working conditions at this plant.
>
> Therefore, we have today notified the Union that henceforth Management will resume dealing directly with its own employees concerning wages and working conditions, and no longer recognizes the Union as the bargaining agent for its employees."

A copy of this notice was transmitted to Wellborn by Gillespie at the request of Wellborn, under date of November 23, 1954, in a letter in which Attorney Gillespie said (in part) that "the information which the Company had, with reference to the desire of its employees, came through verbal statements of the employees."

The Pleadings:

The issues presented here by the complaint and the amended answer have been set forth above. A continued refusal to bargain in good faith is asserted on the one side; a denial of violation of the Act is made on the other. Upon the pleadings, it is possible for the Trial Examiner to make a finding that, justifiably or not, the Company did grant a general wage increase without the prior knowledge or consent of the Union, as alleged in the complaint. The validity of the justification as presented by the Company is decided below.

Concluding Findings

The pertinent provisions of the Act to be considered herein are these:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a) It shall be an unfair labor practice for an employer —

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

In his effort to determine the right findings here, with respect to good faith bargaining, the Trial Examiner has looked for guidance to *N. L. R. B.* v. *American National Insurance Company*, 343 U. S. 395 pp. 402 and 404:

> "The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantial terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining to bargain collectively.
>
> "In 1947, the fear was expressed in Congress that the Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge

> of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make. Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require the submission of counter-proposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. "

From this, then, it appears that the standards to be applied in an attempted resolution of whether a party to collective bargaining negotiations has acted in good faith must be applied to the facts in each particular case, which leaves here the question of whether the Company engaged in mere surface bargaining without any intent of making a final contract with the Union except on its own terms, or whether it stood fast against unreasonable demands by the Union.[12]

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[12] *Cf. N. L. R. B.* v. *Whittier Mills Co.*, 111 F. 2d 474 (C. A. 5); *N. L. R. B.* v. *Athens Mfg. Co.*, 161 F. 2d (C. A. 5); *N. L. R. B.* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C. A. 5); *Texas Foundries, Inc.* v. *N. L. R. B.*, 211 F. 2d 791; *N. L. R. B.* v. *Mayer*, 196 F. 2d 286; see also *N. L. R. B.* v. *Reed & Prince Manufacturing Company*, 205 F. 2d 131 (C. A. 1), cert. den. 346 U. S. 887, wherein the Court said "in such a case the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the Union."

It would seem that after some 20 bargaining sessions, covering a period of some 15 months, that the Union and the Company could or should have come to some agreement which they might have been able to put in writing.[13]

It seems almost inconceivable that Company representatives could sit down over the long period of time with Union representatives as they did here and not be considered to have been bargaining in good faith. Likewise it is hard to understand how the Union representatives could bargain as long as they did and come to a complete impasse with the Company. As pointed out by the Respondent, a good many minor matters were settled through this long period of negotiation; on the other hand, as pointed out by the Union and the General Counsel, the Company from the first moment of meeting refused to accede or to bargain in any respect (except to engage in general discussion) on important matters such as seniority, the writing of a holiday clause, and other conditions requested by the Union. The Company earnestly contends that the Union refused in any way to bargain in good faith on the question of wages but remained adamant in its position that it should have a general increase of 15 cents an hour for each employee in the bargaining unit; the Union just as consistently maintains that it was always ready to bargain on the question of wages as soon as the Company representatives would yield in any respect to promotions, layoffs and recalls, seniority would have some bearing on the way in which these and other conditions of employment were to be regulated under a collective bargaining agreement.

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[13] There was, at the outset of hearing, a claim at least impliedly asserted that the company representatives deliberately engaged in procrastination as to the time of the opening and the following days of meetings. The Trial Examiner did not permit much testimony to this effect. Gillespie, Martin and Honea, of the main negotiators, had offices in Sherman, Texas; Fisher is located in Paris, Texas; Wellborn lives and travels from Oklahoma City, Oklahoma, and Cox lives in Enid, Oklahoma. So far as it appears from the record, each meeting date was set for the convenience and availability of each of these men.

The Union, certainly made more concessions during this long period of bargaining than the Company did. In *Hinde & Dauch Paper Co.*, 104 NLRB 847, the Board laid down the following rule, as asserted by it in earlier cases:

> A certified union's majority status, in the absence of unusual circumstances, is conclusively presumed to continue for one year following certification.

In *American Steel Foundries,* 112 NLRB No. 66, 36 LRRM 1039, the Board considered its use of the meaning of "unusual circumstances," which apparently include, for example, those unusual circumstances which would forgive an employer from continuing (or starting) to bargain with a certified union, and include those where during the certification year, an effective schism occurred in the ranks of the union or it had become defunct. (See cases cited therein, footnote 2 and 3.)

An important question here is whether or not the record reflects a refusal on the part of the Respondent to bargain at a time when it was honestly at an impasse with the Union and was fully convinced that the Union no longer represented a majority of the employees in the bargaining unit, or whether the Respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority status. The critical question is whether under the circumstances of this case the employer was entitled to withdraw recognition of the Union on the basis of a good faith doubt as to the Union's majority. See *N. L. R. B.* v. *Kobritz,* 193 F. 2d 8 (C. A. 1); and cases there cited; *Joy Silk Mills* v. *N. L. R. B.,* 185 F. 2d 732 (C. A. D. C.), cert. den. 341 U. S. 914; *Brooks* v. *N. L. R. B.,* 348 U. S. 96, 101. Cf. *N. L. R. B.* v. *Everett VanKleeck and Company,* 189 F. 2d 516 (C.A.2).

The Board has heretofore held that ordinarily a good faith bargaining impasse connotes the futility of further negotiations and in the case of the employer-party to the collective relations, leaves that employer free to take certain economic steps not dependent upon the mutual consent of the union. *Central Metallic Casket Co.,* 91 NLRB 572. This doctrine of permissible unilateral conduct by the employer is limited to matters which, before the good faith impasse, had been presented by the employer to the union as a subject for bargaining or had been discussed at a bargaining conference. *I. B. S. Manufacturing Co.,* 96 NLRB 1263. Here did such unilateral action go beyond the limitation of the rule? The Trial Examiner thinks it did. The employer bypassed the certified representatives of its employees, in granting the wage increase, and such conduct reasonably must have been interpreted by the Respondent's employees as a withdrawal of recognition of the Union's representative status and was, in effect, an impairment of the collective bargaining process. In the circumstances of this case, the action of the Respondent constituted, *per se,* a violation of Section 8 (a), subdivisions (5) and (1) of the Act, (*N. L. R. B.* v. *J. H. Allison Co.,* 165 F. 2d 766 (C. A. 6), if the employer was inspired to grant a wage increase in order to discourage, and therefore interfere with, employee activity, or union representation of its employees. Cf. *N. L. R. B.* v. *Crompton Highland Mills,* 337 U. S. 217, 221-223.

The Respondent, in support of its position, relies on the decision of the Court of Appeals for the Sixth Circuit in *Mid-Continent Petroleum Corp.,* 204 F. 2d 613. There, in a consent election, the truckdrivers operating from a plant of the employer, having been found to constitute an appropriate bargaining unit, selected the Teamsters' union as their exclusive representative for collective bargaining purposes. Six employees were in the unit, of which four voted for the union representation and two against it. After the union's certification as bargaining representative for the employees in the unit, the employer entered into collective bargaining negotiations with the union. Thereafter, without any unfair labor practice by the employer, one of the six truckdrivers included in the bargaining unit quit his job for personal reasons, and another employee was hired in his stead. Thereafter, within the next 10 days, the new employee and two others in the bargaining unit, without the intervention of any unfair labor practices by the employer, delivered to it separate letters stating, in substance, that they did not want the union or any other labor organization as their bargaining representative. Subsequently, the company withdrew recognition from the union on the ground that it no longer represented a majority of the six employees in the unit. The Court, in its decision, held that the small unit of six truckdrivers had the right to revoke the power of the bargaining agent and that the employer was not guilty of an unfair labor practice for having failed to bargain with the agent in question after its power had been revoked; that whenever the will of the employees to revoke the power of their bargaining agent is clear and unquestioned, effect must be given under the Act to such revocation, and the employees are thenceforth free to bargain collectively through an agent of their choice, if they so desire; and further, that Section 9 (c) (3) of the Act, which prohibits the Board from holding more than one representation election each year in any given bargaining unit, does not imply that employees may not repudiate a bargaining agent within such a yearly period. The court reviewed judicial authority at length, noting those decisions in support of its expressed view, including *N. L. R. B.* v. *Vulcan Forging Co.,* 188 F. 2d 927 (C. A. 6) and also the cases in conflict with its view in other circuits. The Court also said:

> There is no doubt, of course, that where the employer's obstructive tactics, delays, and other unfair labor practices may have contributed to a loss of majority status, the employer is guilty of an unfair labor practice in not recognizing the bargaining agent selected before such unfair labor practices took place. (Citing *Franks Brothers Co.* v. *N. L. R. B.,* 321 U. S. 702.)

In the instant case, the reliance of the Respondent on *Mid-Continent Petroleum* is misplaced. The factual circumstances in that case and this are different.

General Counsel argues that as indicia of lack of good faith on the part of Respondent during the course of the bargaining negotiations herein, that the question of arbitration and grievances, the question of the application of seniority, the refusal of the Company to yield in any respect concerning the writing of a no-strike no-lockout clause, its refusal to put into writing its general practice with respect to pay for holidays not worked, its refusal to write into a contract provisions covering vacations, its refusal to agree in writing not to stagger work hours during a workweek, and its insistence on its right to grant wage increases in its own discretion, shows conclusively that the Company was engaged in "surface bargaining" only. On the other side it is contended on behalf of the Respondent that the Union was equally adamant in connection with its wage demands and in connection with the writing of certain clauses, on which the Company refused to yield, and that after many months of bargaining a real impasse was reached, and it became altogether too apparent that no meeting of the minds with respect to a contract could take place.[14]

Whether the unilateral wage increase put into effect by the Company as of October 4, 1954, can be considered to be a violation of the rights guaranteed to the employees under Section 7 and Section 8 (a) (1) of the Act, must be decided in accordance with the facts as reflected by the record herein. In ordinary case, unilateral action of this kind by an employer during the time of bargaining with a union would be, without doubt, violative of these provisions of the Act. The difference here is this: that after many months, without substantial agreement between the Union and the Company on many important conditions of employment, and no agreement between them regarding wages, the parties were still far apart. Through all the time of contract negotiations, the question of wage adjustments or wage increases was given little consideration, except that the Union did demand a 15 cents per hour general wage increase, and did request certain adjustments of pay for certain categories of jobs.

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[14] There is no requirement under the Act that parties must continue fruitless contract negotiations "in the face of a genuine impasse." *N. L. R. B. v. U. S. Cold Storage Corp.*, 203 F. 2d 924, 928, (C. A. 5).

The Union was, at all times material herein, the exclusive representative of the employees in the certified unit within the meaning of Section 9 (a) of the Act. In determining whether the Respondent has refused to bargain within the meaning of the Act, in spite of the fact that the Union was the exclusive representative of the employees at all times, and the Respondent's ultimate refusal to bargain with the Union after a claimed impasse and after the Respondent became convinced that the union majority was dissipated, consideration must be given as to whether the Respondent's actions in these two important respects were based on a good faith doubt of majority and on a true conviction that further bargaining would be useless. The determination of the question of whether an employer was acting in good or bad faith at the time of the refusal to continue bargaining negotiations and at the time of the wage increase in October means a determination which of necessity must be made in the light of all the relevant facts in the case, including any unlawful conduct of the employer and the sequence of events.

As related above, the Company did make certain wage adjustments insofar as wage rates for certain jobs were concerned in the feed mill after the Union had claimed inequities to be existing at that time, such adjustments having been made by the Company without consultation with the Union. As further pointed out above, the Company representatives entered into negotiations with strict instructions from the president of the Company not to yield in any respect on many important conditions of employment. These facts, together with the disavowal of the Union, the general wage increase and the posting of the notice to the employees on November 19, 1954, comprise a totality of conduct which indicates strongly that the employer did not bargain in good faith. Further than this, before the Company undertook to decide for itself that the rumors of the deterioration in union membership were true, the Company very well could have invoked the provisions of Section 9 (c) (2) (ii) and have had the Board determine the question as to whether or not the Union could still claim the right to represent the employees in the bargaining unit.

This totality of conduct impels the Trial Examiner to find, as he does, that the Respondent Company engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act, as alleged in the complaint.

The Trial Examiner finds that on or about November 21, 1953, and thereafter, on October 6, 1954, and on and after November 19, 1954, the Respondent refused and since the latter date at all times has refused to bargain collectively with the Union as the exclusive representative of the Respondent's employees in an appropriate unit.

IV. The effect of the unfair labor practices upon commerce

The refusal of the Respondent to bargain collectively with the Union, American Federation of Grain Millers, AFL-CIO, as the representative of the employees of the Respondent in a properly certified bargaining unit, as set forth in Section III of this Intermediate Report, in connection with the business activities described in Section I hereof, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States of the United States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent, since on or about November 21, 1953, and thereafter and on October 4 and November 19, 1954, and thereafter, refused and continues to refuse to bargain collectively with the aforesaid Union as the exclusive representative of its employees in an appropriate unit and having found further that the Respondent has failed and refused to bargain collectively with the aforesaid Union with respect to wages, hours of employment, and conditions of employment, and other matters as required by the Act, and has granted a certain unilateral wage increase without consulting with the Union as the representative of the employees of the Respondent in an appropriate bargaining unit, and by so doing has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, it will be recommended that the Respondent cease and desist therefrom.

On the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. The Respondent, Fant Milling Company, is engaged in commerce and activities affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

2. American Federation of Grain Millers, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By refusing and continuing to refuse to bargain collectively with the said American Federation of Grain Millers, AFL-CIO, as the exclusive representative of employees in an appropriate bargaining unit as certified by the Board, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

4. By refusing and continuing to refuse to bargain with the aforesaid Union as set forth above, the Respondent has interfered with, and continues to interfere with the rights guaranteed to its employees under Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. By reason of the acts set forth in paragraphs 3 and 4 above, and by granting a unilateral wage increase without consultation with the aforesaid Union on or about October 6, 1954, the Respondent has interfered with, and continues to interfere with the rights guaranteed to its employees under Section 7 of the Act, and thereby has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8 (a) (1) of the Act.

6. The above described labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the Trial Examiner recommends that Fant Milling Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of its production and maintenance employees employed at the Sherman, Texas, plant of the Respondent, exclusive of chemists and chemists' helpers, office clerical employees, buyers, salesmen, watchmen, guards, and supervisory employees;

(b) Granting unilateral wage increases or putting into effect any other term or condition of employment without consultation with representatives of the aforesaid Union.

2. Take the following affirmative action which the Trial Examiner finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit hereinabove described with respect to wages, rates of pay, hours of employment, and other conditions of employment; and, if agreement is reached, to put it in writing;

(b) Post at its Sherman, Texas, plant, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by a representative of the Respondent, be posted by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to the employees are customarily posted;

(c) Notify the Regional Director for the Sixteenth Region, in writing, within twenty (20) days from the date of this Intermediate Report what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C., this 15 day of March 1956.

(Signed) ARTHUR E. REYMAN
Arthur E. Reyman
Trial Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL bargain collectively, upon request, with AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and upon reaching an agreement with the Union shall reduce that agreement to writing. The bargaining unit is:
>
> > All production and maintenance employees, employed at the Sherman, Texas, plant, of this Company, exclusive of chemists, chemists' helpers, office clerical

employees, buyers, salesmen watchmen, guards, and supervisory employees.

FANT MILLING COMPANY
(Employer)

Dated ________________ By ________________________
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16,953

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

FANT MILLING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Sixteenth Region

In the Matter of

FANT MILLING COMPANY

and Case No. 16-CA-752

AMERICAN FEDERATION OF GRAIN MILLERS, AFL

County Courtroom,
County Court House,
Sherman, Texas
Tuesday, September 20, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

BEFORE:

ARTHUR E. REYMAN, Trial Examiner.

APPEARANCES:

HARRISON C. THOMPSON, JR., Room 2093, 300 West Vickery, Fort Worth, Texas, appearing as counsel for General Counsel.

MULLINAX AND WELLS
BY: HOUSTON CLINTON, JR., 1716 Jackson Street, Dallas, Texas; and

ROY O. WELLBORN, Vice President, 2421 N.W. 18th Street, Oklahoma City, Oklahoma; and

RALPH COX, District Representative, 619 East Maple, Enid, Oklahoma, all appearing on behalf of American Federation of Grain Millers, AFL, the charging party.

[2] FISHER, McLAUGHLIN & HARRISON,
BY: O. B. FISHER, Liberty Bank Building, Paris, Texas; and

GILLESPIE & GILLESPIE
BY: C. H. GILLESPIE, JR., 210 M&P Bank Building, Sherman, Texas, both appearing on behalf of Fant Milling Company, the respondent.

* * * *

[4] PROCEEDINGS

TRIAL EXAMINER:
The hearing will be in order.

* * * *

[5] TRIAL EXAMINER:
If you will bear with me, I would like to read the usual formal opening statement into the record.

MR. FISHER:

Your Honor, before that is done, I would like to make this objection to this proceeding at this time so Your Honor can dispose of it, and that is we object to the hearing at this time before the Trial Examiner, Mr. Reyman, because the Board has not, insofar as this respondent is concerned, designated Your Honor as Trial Examiner to conduct this hearing, that is, we have had no notice whatsoever of any designation of any Trial Examiner for the hearing.

TRIAL EXAMINER:

I really don't know what the procedures are, Mr. Fisher. I know that I didn't know I was designated until last Friday.

MR. FISHER:

I am certain that is correct.

TRIAL EXAMINER:

And ordinarily we do not know more than a day or two in advance when we are being sent out. They assign the cases to us by rotation of the calendar as required by the Administrative Procedures Act.

MR. FISHER:

I certainly realize that it is not a matter within the control of Your Honor, but is within the control of the Board, but we do feel that the parties are entitled to be apprised of the designation of the Trial Examiner to conduct the hearing under the provisions of the Act and therefore we make that objection at this time.

TRIAL EXAMINER:

I will retain my apparent jurisdiction.

* * * *

[29] MR. THOMPSON:

We will stipulate, one, that an election was held under the auspices of the Board, Sixteenth Regional Office, pursuant to a Board order on the 19th day of June, 1953. In that election the union received a majority of the votes cast. That in accordance with the rules of the election, they were certified by the Regional Director for the Sixteenth Region.

MR. FISHER:

Put the vote in that stipulation.

MR. THOMPSON:

I don't have it.

MR. CLINTON:

Ninety-four to eighty-five.

MR. THOMPSON:

That they received in the election a majority of the votes cast, the vote being as shown by the Board's records, 94 to 85.

That on June 26, 1953, they were certified as the exclusive bargaining agent of the employees in the unit specified in the Board order. That is the second point.

[30] The third point: That immediately following the election, Mr. Wellborn, on behalf of the union, requested that the employer begin negotiating. That's on June 19, immediately following the election. That Mr. Wellborn was then informed by representatives of the company, I believe the representative was Mr. Honea, that he would not be available due to prior commitments. In fact, that during the month of July he had planned to take some time off, and that Mr. Wellborn finally contacted the company by letter to Mr. Honea requesting a meeting to begin negotiations on August 13, 1953, the date of the letter being August 2, 1953, and that the first session between the company and the union was held as requested by Mr. Wellborn.

MR. FISHER:
When contract negotiations were commenced.

TRIAL EXAMINER:
What was that date?

MR. THOMPSON:
The first negotiation meeting was held in Sherman on August 13, 1953.

MR. FISHER:
And that both parties on that date commenced contract negotiations.

MR. THOMPSON:
Contract negotiations commenced on that date.

That's our proposed stipulation.

Are we on the record?

TRIAL EXAMINER:
I believe the reporter took it down in case you wanted it.

MR. FISHER:
It may be so stipulated.

[31] TRIAL EXAMINER:
Would you like to have it read back?

MR. THOMPSON:
One more thing in connection with the stipulation. If you would like, I can introduce into the record a copy of the letter. We can stipulate that you met as requested on that date.

MR. FISHER:
All right.

MR. THOMPSON:
In connection with the stipulation, and as a part thereof, counsel for the respondent and counsel for the General Counsel have agreed to include a copy of the letter from Roy O. Wellborn, vice president of the union, to Mr. Honea, secretary of the Fant Milling Company, dated August 2, 1953, requesting a meeting to be held on August 13, 1953. This will be offered as General Counsel's Exhibit 2.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

MR. FISHER:
And will you add which date was agreeable with the company and the company began contract negotiations on that date.

MR. THOMPSON:
That is agreeable with the General Counsel. So stipulated.

General Counsel's Exhibit 2 is offered in evidence as a part of the stipulation:

TRIAL EXAMINER:
The stipulation is agreeable to Mr. Clinton, I assume.

[32] MR. CLINTON:
Yes.

TRIAL EXAMINER:
All right. It is so stipulated and General Counsel's Exhibit 2 is received in evidence pursuant to stipulation.

* * * *

[34] ROY O. WELLBORN,
a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Thompson) Please state your name.
A Roy O. Wellborn.

Q What is your address, Mr. Wellborn?

A 2421 Northwest 18th, Oklahoma City, Oklahoma.

Q And what is your occupation, Mr. Wellborn?

A International vice president of the American Federation of Grain Millers, AFL.

* * * *

[35] Q (By Mr. Thompson) After the election on August 13, 1953, did you in your capacity meet with representatives of the company, of the Fant Milling Company, here in Sherman?

A I did meet with the company on August 13, 1953.

Q Where was the meeting held?

A In the company's office here in Sherman.

Q Who was present at that meeting in behalf of the union?

A I was present and there was a union committee selected from the employees present. I can't remember their names, but I do [36] have them in my notes if I am allowed to read them.

Q Just a moment before we go into that. Who acted as spokesman for the union at that meeting?

A I did.

* * * *

[38] Q (By Mr. Thompson) What was the purpose of this meeting, Mr. Wellborn?

A The purpose of this meeting was to present the company with [39] a proposal, a contract proposal, prepared by the union and to start negotiations for a contract covering the employees.

Q Was that done?

A Yes, sir.

MR. THOMPSON:

I have a document here which I will ask the reporter to mark for identification as General Counsel's Exhibit 3. This document is some 15 pages long. It is undated. It purports to be a copy of "Agreement, Fant Milling Company and American Federation of Grain Millers," contains some 52 numbered paragraphs, no signatures. I'd like to have this marked.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q (By Mr. Thompson) I'd like to show this to you, Mr. Wellborn, and ask if you recognize it. Do you recognize that, Mr. Wellborn?

A I would say that is a copy of the document I presented to the company.

Q This is a copy of the union contract proposal presented on August 13 to the company officials?

A Yes, sir.

* * * *

[41] Q (By Mr. Thompson) At what point during the meeting was this exhibit offered to the company representatives?

A At the beginning of the meeting.

Q After the proposed contract, GC-3, was offered, what then transpired, Mr. Wellborn?

A The company, I believe Mr. Martin asked me to go through and [42] explain the meaning of the various paragraphs in the contract, which I did.

Q After you explained the provisions of the contract, then what happened?

A I requested that the company supply me with a list of their employees, their seniority dates.

* * * *

Q (By Mr. Thompson) What reply if any did the company give [43] you concerning requests concerning the information you had asked for?

A I hadn't finished my answer when I was interrupted.

Q I see. I asked you what happened next after you presented the contract and you had gone through it.

A Then I made the request of the company to supply me with this information.

Q That's the information — what information? Repeat it again.

A A list of the employees, their seniority dates, the list of departments in the plant, a list of the classifications and the wage rates.

Q Did the company then supply you with that information?

A I was informed by the company that they did not have any records showing the seniority dates of a great many of their employees. They did supply me with a partial list of the departments that was in effect in the plant. I believe that was about all that I can remember.

* * * *

[89] TRIAL EXAMINER:

Does your record show — I have forgotten at the moment — the positions occupied by Mr. Honea and Mr. Martin at these times?

MR. THOMPSON:

I don't believe that is on the record yet. I understand that Mr. Martin was the vice president and Mr. Honea was the secretary during these times; is that correct?

MR. FISHER:

Yes, it is stipulated they are both officers. Mr. Honea is executive vice president of the company.

MR. THOMPSON:

What about this secretary?

MR. FISHER:

I believe he is vice president, too.

MR. THOMPSON:

We so stipulate.

* * * *

[102] RALPH COX,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Thompson) Please state your name.

A Ralph Cox.

Q What is your address, Mr. Cox?

A 619 East Maple, Enid, Oklahoma.

Q What is your occupation?

A I am district representative of the American Federation of Grain Millers, AFL.

Q In your capacity as district representative of this union, did you participate in meetings of contract negotiations with Fant Milling Company?

A I did.

* * * *

[120] Q (By Mr. Thompson) After the letter of November 3, when was the next meeting held?

A I believe it was on November 12.

* * * *

[134] Q Do you remember what was discussed first at that meeting on November 12?

A As I recall, the company, Mr. Gillespie, presented us with a proposed outline of a contract.

MR. THOMPSON:

I have here a document which I am going to ask the reporter to mark for identification as General Counsel's Exhibit No. 10.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 10, for identification.)

MR. THOMPSON:

This document is some four pages long, typewritten, the heading is Fant Milling Company, contract with employees. It is undated and not signed.

Q (By Mr. Thompson) I ask you to examine this and see if that is the proposal presented to you at the meeting about which you have just testified.

* * * *

A It is.

* * * *

[207] Q (By Mr. Thompson) Getting back to the April 8 meeting, Mr. Cox, please refer to Article 5. I think it is Article 5 of the exhibit to which you were referring when we stopped here a moment ago. It is General Counsel's Exhibit 16 entitled "Wages." I was asking you questions concerning the feed mill, the feed mill included in the Article 5.

A That is correct.

Q Was there discussion concerning the feed mill at the meeting?

A There was.

Q What did the union say about the feed mill, if anything?

A I asked the company to take a look at the wage rates in the feed mill, that it appeared to me that there was too many classifications on the $1.36 rate, that it seems to me there was a need for some wage adjustments on these classifications. I asked them to look at it and consider it so we could discuss it in the next meeting.

Q What did they say?

A They said, in glancing at it, it did look like there was some discrepancies there; they would consider it and they would give consideration to it.

Q Now, I direct your attention to the next meeting held on April 22, 1954.

In connection with this meeting on April 22, 1954, I would [208] like to ask the reporter to mark for identification another exhibit, General Counsel's Exhibit 17.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 17, for identification.)

MR. THOMPSON:
Mr. Fisher, do you have this?

TRIAL EXAMINER:
What is this meeting you are going to now?

MR. THOMPSON:
April 22 I think is the next in order.

The document that I have asked to be identified as GC-17 is a two-page document, typewritten, headed "Article 5. Wages."

Q (By Mr. Thompson) I would like to have you look at this, Mr. Cox. What is that, Mr. Cox?

A This is Article 5, classification and wage proposal that the company presented to the union in this April 22 meeting.

Q Keep it for reference during my questions if you will, please, sir.

I would like at this time to offer in evidence General Counsel's Exhibit 17.

MR. FISHER:

No objection.

TRIAL EXAMINER:

Without objection, General Counsel's Exhibit 17 is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 17 for identification, was received in evidence.)

[209] TRIAL EXAMINER:

I want to be quite sure I understood you correctly. This is a company proposal?

Q (By Mr. Thompson) Is that correct, Mr. Cox?

A That is correct.

Q In connection with this Exhibit 17 that I just handed you and has been received in evidence, was there any discussion at this April 22 meeting concerning the classification entitled "Feed Mill" on this document?

A Yes. When this document was presented to me by the company, said, "I call your attention to the feed milling department, and through discussion in our last meeting, we took a look at that and decided there was some need for adjustments there. We granted some adjustments and they were put into effect on April 19."

Q Had you been told that the adjustments would be put into effect on April 19?

A I had not.

Q Had you been told at any time prior to the time that they were put into effect that they would be put into effect?

A I was not.

Q Had any representative of the union or the committee to your knowledge been so informed?

A They had not.

* * * *

[211] Q (By Mr. Thompson) I am talking about the April 22 meeting, Mr. Cox, and specifically with reference to the adjustments in the feed mill. Did you know prior to the April 22 meeting that these adjustments had been made?

A I did not.

* * * *

[212] Q (By Mr. Thompson) To clear it up, did the company tell you on April 22 when this adjustment had been made effective?

A Yes, they did.

Q Did they tell you the date?

A Yes.
Q What date was it?
A April 19.

* * * *

[234] Q I direct your attention to the meeting of May 21, 1954, [235] the date having been stipulated, and it further having been stipulated that you were present.

At this time I would like to ask the reporter to mark for identification a one-page typewritten document entitled, "Article 5. Wages," as General Counsel's Exhibit No. 21.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 21, for identification.)

TRIAL EXAMINER:
What is that document entitled?

MR. THOMPSON:
"Article 5. Wages."
Q (By Mr. Thompson) I would like to show this to you, Mr. Cox. Tell us what it is, if you will, please, sir.
A It is a proposal from the company to the union on their Article 5, Wages.

* * * *

[236] Q (By Mr. Thompson) You said there was discussion about this, Mr. Cox. What did the union have to say about this proposal?

A I stated to the company that there was no deviation from this and their previous proposal; that the union could not give the company the unilateral right to raise wages, lower wages, without consent of the union.

* * * *

[237] Q This apparently is not a complete Article 5, Wages; is that correct?

[238] A That is correct.

Q What part of Article 5 does this appear to be or did you understand it to be at that meeting?

MR. FISHER:

No —

A That it was a substitute for the first paragraph in Article 5 of the wage proposal.

* * * *

[263] ROY O. WELLBORN,

a witness called by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

TRIAL EXAMINER:

Will you note that the witness has been previously sworn?

DIRECT EXAMINATION (Continued)

~~[264] Q (By Mr. Thompson)~~ . . .

* * * *

[281] Q Did you meet with the company on November 19?

A I did.

TRIAL EXAMINER:

Now, when you speak of the meeting of October 15, Mr. Wellborn, it is my understanding you are talking about a meeting of yourself and the negotiating committee with the representatives of the union, or of the company, rather.

[282] THE WITNESS:

Actually, at that meeting I was there alone.

MR. THOMPSON:

Mr. Examiner, if I may interrupt, we have stipulated on that.

TRIAL EXAMINER:

I gathered an impression that Mr. Wellborn was there by himself.

MR. THOMPSON:

That's right, that's what our stipulation was.

Q (By Mr. Thompson) You say you met on November 19?

A Yes, sir.

Q Who was present for the union at that meeting?

A Myself and Roy Rolen.

Q And who was present for the company?

A Mr. Gillespie, Mr. Fisher, Mr. Honea, Mr. Martin and a court reporter.

Q Where did you meet?

A In Mr. Gillespie's office here in Sherman.

Q About what time did the meeting start?

A I believe it was around 10:00 or 10:30 in the morning.

Q What was the first matter of business at that meeting, Mr. Wellborn?

A The first matter of business, Mr. Gillespie told me that he and Mr. Fisher had been going over the various proposals and requests, and they had decided that the union wasn't too interested in getting a contract; they had also decided that, or they had also had information that the employees no longer wanted the [283] union to represent them; therefore, they would refuse to bargain any further.

Q What did you say when you were told this?

A I told them that I certainly felt that we represented a majority of the employees; that we had been trying for some 15 months to get a contract, we sincerely wanted a contract that the people could live with. We was ready now as we had been at all times to negotiate such a contract and we'd like to do so.

Q What reply did you receive, if any?

A Mr. Fisher, I believe it was Mr. Fisher, said that they had been meeting with us for some 15 months and in his opinion that the union was not interested in arriving at a contract. They had offered us several contracts and all of them had been refused, and that they had information from the employees in the plant that they no longer wanted the union to represent them.

Q Did Mr. Fisher tell you what his source of information was?

A I asked Mr. Fisher what the source of his information was, and he told me, by word of mouth, or grapevine procedure.

Q What did you say, if anything?

A I told Mr. Fisher that their action was not too surprising to me because I had felt for quite some time that the company was not sincerely trying to arrive at a contract and they were only stalling negotiations long enough where they could force the union into a position to reassert a majority.

Q Had this question of majority ever been raised prior to this [284] meeting to you by the officials of the Company or anyone else?

A It never had.

Q About how long did this meeting last of November 19?

A I would say, oh, in the neighborhood of 20, 25 minutes.

MR. THOMPSON:

I would like to ask the reporter to mark for identification a letter, typewritten letter, with an attachment as General Counsel's Exhibit No. 28, the letter being a copy of a letter on the letterhead of Law Offices of Gillespie & Gillespie, addressed to Mr. Roy ~~O.~~ Wellborn, showing that it was signed by Mr. C. H. Gillespie, Jr., the attachment being a one-page typewritten document dated November 19, 1954, addressed "To Our Employees," showing that it was signed by Fant Milling Company, Jas. A. Fant, President.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 28, for identification.)

MR. THOMPSON:

I show this to counsel for the respondent.

TRIAL EXAMINER:

What was the date of the letter to Mr. Wellborn?

MR. CLINTON:

November 23. The attachment was November 19.

Q (By Mr. Thompson) I would like to show this document, which was heretofore identified as General Counsel's Exhibit No. 28 to the witness and ask him to tell us what it is.

A It is a letter I received from Mr. Gillespie which was in answer to a letter that I had written him requesting a copy of [285] a letter that I had been informed had been posted on the bulletin board down at the Fant Milling Company.

Q What is the second page, Mr. Wellborn?

A The second page is a copy of the letter that Mr. Gillespie sent me, purportedly to be a copy of the letter that was attached to the bulletin boards down at the Fant Milling Company.

* * * *

[287] MR. THOMPSON:

I would like to ask if you will stipulate that is a true copy of the notice on the bulletin board.

* * * *

[288] **MR. FISHER:**

It may be stipulated that GC-28 received in evidence is a correct copy of a letter written by Mr. Gillespie to Mr. Wellborn November 23, 1954, and that the attachment to GC-28 is a correct copy of a notice posted by Fant Milling Company November 19, 1954.

MR. THOMPSON:

General Counsel so stipulates.

MR. CLINTON:

So do I.

TRIAL EXAMINER:

Very well, the stipulation is shown on the record.

* * * *

[291] CROSS EXAMINATION

* * * *

[321] Q (By Mr. Fisher) Now, Mr. Wellborn, on August 13, to whom did you hand the proposal to which you refer, General Counsel's Exhibit 3?

A It seems to me like that I handed both Mr. Martin and Mr. Honea one.

Q And where were you at that time?

A It was in the company's offices down at the plant.

Q Did or did not you and Mr. Martin or Mr. Honea or any of you at that time attempt to go over the contract or read it or ascertain what was in it or inform anyone else as to what was in it?

[322] A Yes, we went through the contract and I explained the provisions therein.

* * * *

[340] Q (By Mr. Fisher) Mr. Wellborn, why did you make an explanation of each and every paragraph contained in that contract to Mr. Honea and Mr. Martin?

A That is the usual procedure in presenting a company with a proposal.

Q Well, did they ask for it or —

A Of course they asked for it.

Q — or did you volunteer it?

A Sometimes they ask for it and sometimes I volunteer.

* * * *

[347] Q Your attention is directed to Paragraph 10. Tell the Examiner why you made an explanation of Paragraph 10 to Mr. Honea [348] and Mr. Martin.

A Because it is the usual procedure that we explain all the provisions in the contract when we present them to a company.

Q Now, Mr. Wellborn, were you interrupted by either Mr. Honea or Mr. Martin at any time you were making your explanation of this contract or did they listen to you courteously and politely?

A Why, it seems possible like Mr. Honea asked a question or two but if he did it was not more than a few.

Q Do you recall any question asked by Mr. Honea?

A I just have a faint memory of him asking something, but I don't remember what it was.

Q Please give us the benefit of your faint memory, if you have any faint memory at all.

A I have already given it to you.

Q Did Mr. Martin ask any questions of you during that time?

A I don't know whether he did or not.

Q What did you say when you had concluded your explanation, please?

A Well, I asked them for a list of the employees, their seniority, classifications and their wage rates.

Q To whom did you address that request?

A Well, to both of them.

Q All right, did either of them respond?

A I think Mr. Martin did, and he gave me a partial list, I believe it was departments rather than classifications, in the [349] plant.

Q Did he give it to you in writing?

A No, I just wrote them down.

Q All right, sir. You made the memorandum there as he gave them to you?

A Yes, I did.

Q Do you have it with you at this time?

A Well, I had it here somewhere. Yes, I have.

Q May I see what he gave you?

A You may see what I wrote down.

Q Thank you, sir. That will be more accurate.

MR. CLINTON:

May the record show that counsel is now examining the minutes made by the witness during this meeting.

MR. FISHER:

Miss Reporter, may this instrument I hold in my left hand, being three yellow pages, may it be marked Respondent's Exhibit No. 1-A, -B and -C for identification.

(Thereupon, the documents above referred to were marked Respondent's Exhibits 1-A, 1-B and 1-C for identification.)

Q (By Mr. Fisher) Mr. Wellborn, I will ask you to look at Respondent's 1-A for identification and state what departments Mr. Martin named to you in response to your request for departments. I don't know whether I am looking at the right page.

A Feed mill, trucking department, mixing, cake mix and packaging department, flour mill department.

[350] Q Mr. Wellborn, did you or did you not inquire of Mr. Martin or Mr. Honea as to anything further in connection with those departments?

A Well, I asked about the classifications in the departments.

Q All right, sir. Then, did he give you the classifications in the feed mill or just what was said now?

A Oh, Mr. Martin?

Q What did you say and what did he say?

A I believe Mr. Martin told me that they didn't have all of the jobs out there classified and he would have to get them for me later.

Q Well, did you get from him any of the classifications at that time?

A I don't think so.

Q You may look at this if you care to. What discussion did you and he have with reference to the trucking department at that time?

A I don't know as we had any.

Q Well, did you have any discussion concerning any of these departments at that time?

A Well, we might have had some discussion. We usually have some type of discussion on those things.

Q But you do not recall any specific discussion that you had?

A No, I don't remember what it was.

Q Did you ask him for anything at that time that he did not [351] at that time give you?

A Yes.

Q Now, what was that, please?

A I asked him for a list of the employees and their seniority dates, their hiring date, a list of the classifications and their wage rates, a list of departments. He gave me part of the departments and that's all he gave me.

* * * *

[415] MR. FISHER:

Mr. Examiner, we desire to have marked for identification a stenographic report of negotiating conference held May 6, 1954, between representatives of the union and respondent, made by Solon Stanley, court reporter, and Notary Public in and for Dallas County, Texas.

Please let it be marked Respondent's Exhibit No. 2 for identification, and this is in connection with the cross examination of Mr. Wellborn.

TRIAL EXAMINER:

Very well.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

TRIAL EXAMINER:
That is the May 6, 1954, meeting?

MR. FISHER:
Yes, sir. And, Mr. Examiner, we desire to address Mr. Thompson with reference to this stenographic report which has been discussed off the record between us, and to propose a stipulation that Respondent's Exhibit 2 for identification constitutes a sole and complete transcript of the proceedings between the parties at the negotiation conference held in Sherman, Texas, on May 6, 1954, and may we have such a stipulation?

[416] MR. CLINTON:
With one exception, Mr. Fisher, we think there is a typographical error on one page there that we want to call your attention to and see if you and Mr. Gillespie can agree that the reporter misread his notes.

MR. THOMPSON:
Page 92.

MR. FISHER:
Well, I noticed two or three typographical errors that I didn't pay any attention to.

MR. THOMPSON:
On Page 92 there appears the word "arbitration." I

think it is "arbitrary." That is the only sense we gather from it. It is the third line from the top.

MR. GILLESPIE:
Mr. Fisher, I believe that is correct. I noticed that when I read it.

MR. FISHER:
Yes, sir, it is correct. Line 3, the first word in Line 3 on Page 92 as typed is "arbitration," and the word intended was "arbitrary."

TRIAL EXAMINER:
Will you make the pencil correction?

MR. FISHER:
We will manually correct that.

MR. THOMPSON:
That is perfectly agreeable with General Counsel.

MR. FISHER:
It is manually corrected by deleting the letters "tion," and adding the letters, "ry."

MR. THOMPSON:
With the correction noted, General Counsel will stipulate as propounded by counsel for the respondent.

MR. CLINTON:
The union so stipulates.

TRIAL EXAMINER:

Very well. By stipulation of all parties, [417] Respondent's Exhibit 2 is received in evidence.

* * * *

[422] MR. THOMPSON:

Mr. Examiner, during the recess between yesterday and this morning, counsel for respondent, counsel for union and counsel for General Counsel have agreed to enter into a stipulation concerning certain transcripts of meetings between the parties and at this time I would like to offer the stipulation.

TRIAL EXAMINER:

Very well.

MR. THOMPSON:

It is hereby stipulated by and between counsel for the General Counsel, counsel for the respondent and counsel for the union as follows: The respondent will obtain [423] all of the available transcripts of the remaining meetings between the parties and submit them to counsel for the General Counsel for verification, it being contemplated that all parties make or will make any necessary and proper corrections; then such transcripts will be offered in evidence when the hearing is reconvened for conclusion, these transcripts to be offered in the same manner as the transcript of the meeting of May 6, 1954, which was received in evidence yesterday as Respondent's Exhibit 2.

It is further stipulated and agreed, at the pleasure of the Trial Examiner, that is, that the hearing be recessed as contemplated by the foregoing statement, and further that when the hearing is reconvened, all parties shall be permitted to introduce such evidence as necessary including the conclusion of the examination of the witnesses, Mr. Cox and Mr. Wellborn.

Concerning a date for the resumption of the hearing, all parties will earnestly attempt to complete their examination of these remaining transcripts within six weeks from this date, and in any event, when they have completed such examination, they will jointly petition the Honorable Trial Examiner to set a date for resumption of the hearing.

That is the end of the stipulation.

General Counsel so stipulates.

MR. FISHER:
Respondent so stipulates.

MR. CLINTON:
And so does the union.

* * * *

[458] PROCEEDINGS

TRIAL EXAMINER:
We will open the record.

Let the record show that the hearing was adjourned by the Trial Examiner's own motion from November 29, 1955, to November 30, 1955. I notice the appearances this morning of Mr. Thompson for the General Counsel, Mr. Wells for the charging party, Mr. Gillespie and Mr. Fisher for the respondent.

I hope the delay of one day didn't cause any inconvenience. It was simply because I was unable to get a plane out of Washington Monday and had to wait until yesterday. Mr. Fisher.

MR. FISHER:

Mr. Reyman, there was no inconvenience on the part of the respondent by reason of the delay.

The respondent at this time desires to amend its answer by adding Paragraph No. 5 following Paragraph No. 4 of the answer, such addition being:

"Paragraph 5. Respondent alleges that on or about November 19, 1954, and prior thereto, a genuine impasse was reached by the union and the employer in contract bargaining negotiations, neither being willing to give up its position on each and all of the bargaining subjects:

"(a) A no-strike and no-lockout clause providing for penalty for violation in favor of the non-offending party against the offending party.

"(b) Providing for arbitration in the contract.

"(c) A provision in the contract that continuous service [459] should control promotions, demotions, layoffs and recall of employees instead of ability to work or to do the job involved."

The respondent prays that such amendment be permitted at this time and that the amendment be considered for all purposes as a part of the answer to the same extent as if it had originally been included therein.

MR. WELLS:
May we see a copy of that, please?

MR. FISHER:
I just have a scratch copy here. I would be glad for you to see that.

TRIAL EXAMINER:
The date you read, Mr. Fisher, of the stated impass was October 7, 1954; did I understand you correctly?

MR. FISHER:
November 19 and prior thereto.

TRIAL EXAMINER:
November 19 and prior thereto.

MR. FISHER:
Yes, sir. In connection with the amendment, respondent desires to state that some six or eight weeks ago counsel for General Counsel was apprised of the amendment.

MR. THOMPSON:
Apprised there was going to be an amendment.

MR. FISHER:
Yes, sir.

MR. THOMPSON:
That is correct, but not as to the contents thereof.

MR. FISHER:
That's right. Well, the contents to the extent of the impass.

MR. THOMPSON:
True we were advised that the answer would be amended to allege an impass, but as to what the impass alleged would be, we were not advised.

[460] MR. FISHER:
That is correct.

MR. THOMPSON:
Before ruling on the motion to amend, Mr. Examiner, I would like to request that a bit of clarification be made with respect to some of the general language in the introductory paragraph to the amendment, namely, the clause beginning "Neither being willing to give up its position on each and all of the bargaining subjects." Thereafter three specific subjects are enumerated. Does respondent intend to allege an impass on everything or just the three specified?

MR. FISHER:
Just the three specified.

MR. WELLS:
If the Examiner please, the union will object to the granting of the motion to amend unless a specification is required with respect to the time of the alleged impass. If we understand respondent's proposed motion, it alleges that "On or

about November 19, 1954, and prior thereto," et cetera. Now, we think at the very least we are entitled to know with some specification at what meeting or at what particular time the respondent, months, indeed a year after some, after the event, now claims that there was an impass.

MR. THOMPSON:

General Counsel will join in the motion of the counsel for the union.

TRIAL EXAMINER:

I was about to remark that Mr. Wells is somewhat handicapped because he wasn't here during the first days of the hearing. If I understand Mr. Fisher's motion to amend correctly, it is that an impass had been reached on [461] November 19 and at no times prior to that time had the parties been able to agree on these three particular issues which ~~had been discussed during the negotiations.~~

MR. FISHER:

That is correct, Your Honor, and that the impass had actually been reached prior to November 19.

MR. WELLS:

When?

TRIAL EXAMINER:

On the testimony, as I recall, from glancing at my notes, as far as we have gone in connection with these various meetings, on the testimony of Mr. Wellborn and Mr. Cox, those matters had been pretty thoroughly discussed at each one of those meetings.

MR. FISHER:

That is correct, sir.

TRIAL EXAMINER:

I am inclined to grant the motion to amend over the objection of counsel for the General Counsel and counsel for the charging union and I do grant the motion.

MR. THOMPSON:

Well, counsel for the General Counsel at this time then would like to ask and move that respondent be required to specify with particularity, especially with respect to dates, as to when an impass on these three specified subjects was reached during the meetings between the parties. Three specific items are alleged.

TRIAL EXAMINER:

Yes. You think, then, the words "prior thereto" are too indefinite to permit you to meet the issue raised by this amendment to the answer?

MR. THOMPSON:

Yes, sir. As the Trial Examiner noted, these [462] three items, and as Mr. Fisher acknowledged, these three items were discussed on many occasions prior to this particular date. We'd like to know upon which of the various dates they were discussed when this alleged impass was reached as contended by the respondent.

TRIAL EXAMINER:

Let me ask Mr. Fisher this. Do you intend on your case, Mr. Fisher, to present affirmative evidence other than what is contained in the transcripts which you have in connection with your amendment?

MR. FISHER:
Well, of course, I wouldn't want to make a definite commitment on that at this time, because actually nothing is in evidence yet.

TRIAL EXAMINER:
Yes, that's true.

MR. FISHER:
But right at this time we do not contemplate offering any testimony other than maybe one witness, if any at all. I don't want to make a commitment, but probably none at all other than what is in the record.

TRIAL EXAMINER:
No, I won't require a commitment. I just wondered what you had in mind. It seems to me that the basis of the stipulation in the record now regarding the use of the transcripts of negotiation proceedings, that it would very well show when, if it did happen, that a particular issue was abandoned by both parties on their complete failure to reach an agreement.

MR. THOMPSON:
That's true, Mr. Examiner, but for the [463] purposes of argument, the General Counsel is at a distinct disadvantage in not knowing upon which of these instances the respondent is relying to show the impass.

TRIAL EXAMINER:
Yes.

MR. THOMPSON:
When in a brief, for example, respondent intends to argue that on a certain day the particular item was in fact abandoned because of an impass, we have no way of knowing in advance what that argument is going to be, and we would like to know the date upon which they contend the impass was reached. It won't require the adducing of any additional testimony or any additional evidence, just to specify for General Counsel and the union on which of these meetings respondent contends the impass was reached.

TRIAL EXAMINER:
I will tell you what I will do. I will hold that question open. Let's go ahead and see how far we go, and if it appears that you will be prejudiced, then, we will meet the question of specification of date.

MR. THOMPSON:
All right, sir.

TRIAL EXAMINER:
Is that agreeable?

MR. THOMPSON:
Yes, sir.

MR. FISHER:
And in connection with the statement that has been made with reference to the three bargaining subjects, of course, it is the position of the respondent that an impass was

reached on the entire contract by reason of the deadlock on those subjects.

[464] MR. THOMPSON:

In other words, Mr. Fisher, if I understand you correctly, your contention is that on these three subjects a deadlock was reached, and because of this deadlock, the entire contract —

MR. FISHER:

That an impass existed on the entire contract. I want to make that plain.

TRIAL EXAMINER:

Yes, that is very clear.

MR. WELLS:

Of course, on that basis, we move to strike the entire amendment. Just as a matter of law; by assuming but not admitting there was an impass on some particular provision with respect to a particular working condition, it is the union's position that this would not excuse failure to bargain on other wages, hours and working conditions.

TRIAL EXAMINER:

Oh, yes. Well, that is implicit in the record up to date because there is a showing on the record now, and conceded by the respondent and the charging party both, that certain agreements were reached, that is, on particular minor matters, subject to full agreement of a whole package deal, so to speak.

MR. THOMPSON:

Mr. Examiner, I suppose at this time we had better request that we go off the record for a few moments to attempt to work out with respondent the wording of the stipulation or the agreement by which we will introduce these numerous transcripts, the remaining numerous transcripts. There are some, I believe 18, additional transcripts besides the one already in [465] the record.

TRIAL EXAMINER:

Very well. Off the record.

(Discussion off the record).

TRIAL EXAMINER:

On the record.

MR. FISHER:

Respondent moves to amend Paragraph 5 of its answer as amended by adding immediately after and following Clause (c) of Paragraph 5, the following:

"That by reason of such impasse and deadlock, further bargaining negotiations between the parties were futile and no obligation existed on the part of the employer to continue bargaining negotiations with the union."

TRIAL EXAMINER:

I suppose your same objections would hold.

MR. THOMPSON:

Yes, sir. Mr. Examiner, at this time I would like to request the respondent, if possible, to supply us with a copy of the answer as dictated into the record before the close of the proceedings.

MR. FISHER:
I will do that. I don't have it now. That is, I have it in scratch form.

MR. THOMPSON:
I mean sometime before we wind this thing up.

MR. FISHER:
All right, we will do that.

MR. THOMPSON:
I think the record should indicate at this time that during the off-the-record discussion between the parties, that the transcripts, which have been the subject of a [466] great deal of discussion in this hearing, have been marked for identification at the request of respondent as Respondent's Exhibits 3 through 20 as indicated on the transcripts themselves.

(The documents above referred to were marked Respondent's Exhibits No. 3 through 20 for identification during an off-the-record discussion.)

* * * *

[468] MR. THOMPSON: . . .

* * * *

In connection with the exhibits identified on the record as previously, General Counsel would like to propose the following stipulation:

It is hereby stipulated by and between counsel for respondent, counsel for the charging union and counsel for the General [469] Counsel that Respondent's Exhibits 3 through 20 for identification, such exhibits being transcripts of negotiation meetings between the respondent and the union, were obtained by the respondent and submitted to the union and counsel for General Counsel for review; that said transcripts have been reviewed by the union and counsel for the General Counsel. Further, that if the reporters who were present and recorded said meetings were called as witnesses in this proceeding, said reporters would testify that these transcripts were made by them from their recordings and constitute a complete transcription to the best of their ability and skill. Further, that said transcripts are substantially correct.

MR. WELLS:

As we indicated off the record, we are agreeable to the stipulation except for the last sentence, namely, "Further, that said transcripts are substantially correct." We do not agree to that.

MR. FISHER:

Respondent accepts the stipulation in its entirety and only in its entirety.

TRIAL EXAMINER:

The stipulation, then, as between counsel for the General Counsel and counsel for the respondent as offered by counsel for the General Counsel is received as a stipulation between all the parties with the modification suggested by Mr. Wells on behalf of the union.

MR. FISHER:
The Exhibits 3 through 20 are offered in evidence.

[470] TRIAL EXAMINER:
Very well. The exhibits will be received as identified on the record, Respondent's Exhibits 3 through 20.

* * * *

MR. FISHER:
In view of the stipulation just proposed and accepted, and the reception in evidence of Respondent's Exhibits 3 through 20, respondent waives cross examination of Mr. Cox and Mr. Wellborn.

MR. THOMPSON:
With that, General Counsel at this time rests.

* * * *

[477] V. I. MARTIN,
a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Fisher) What is your name, please?
A V. I. Martin.
Q And your address?
A Home address?

* * * *

[480] Q Mr. Martin, when you came to Sherman, did you become connected with any institution in Sherman?

A I did.

Q What was it, please?

A Fant Milling Company.

Q By whom were you employed?

A James A. Fant, president of the company.

Q And in what capacity did you go to work for that company?

A As vice president and assistant general manager.

* * * *

Q Is there an executive vice president of Fant Milling Company?

[481] A There is.

Q And what is his name?

A Fred Honea.

Q And that is the Mr. Honea who has been with us during part of this proceeding?

A. That is correct.

Q What is his full title and full responsibility as an officer of the company?

A Executive vice president and secretary.

* * * *

[483] Q State in a general way what the function of Mr. Fant is as [484] president and general manager of the plant.

A He is president and general manager of the plant, quite emphatically.

Q All right, sir. Has it been his practice or has it not been his practice to exercise the function —

A It has been his definite practice.

Q — usually authorized as being vested in a manager or in a general manager?

A It has been his definite practice.

Q Now, Mr. Martin, either before or after, and we will determine which, if either, was there a meeting between you and Mr. Fant and any other persons in the management disconnected from the union representatives with reference to contract negotiations?

A There was.

Q Now, was that before this first meeting on August 4 — I don't mean to suggest that but on some date during August that you mentioned?

A It was after.

Q Where was that meeting that you referred to?

A In Mr. Fant's office.

Q And what persons were present, please?

A Mr. Honea, Mr. Gillespie, Mr. Fisher and myself.

Q Do you have any way of fixing the date?

A No, sir, I do not.

[485] Q At the time of that meeting, had or had not Mr. Gillespie, as attorney for the company, met with the union in any bargaining session?

A I don't think so.

Q At the time of this meeting that you refer to with representatives of management of the company and attorneys for the company in this matter in Mr. Fant's office, had there been any meeting with the representatives of the union other than the one meeting that you have referred to?

A That was the only meeting that I attended. I don't think there was any others.

Q Who at that time determined the policy of Fant Milling Company?

A Mr. Fant.

Q Now, on the occasion of this meeting in his office, state whether or not he gave any instructions to you or any other person or assigned any work or duty to you or any other person.

A He did.

Q Did he or did he not designate any persons out of the management of the company to negotiate a union contract?

A He did.

Q Whom did he designate?

A Mr. Gillespie and Mr. Fisher.

Q You refer to the attorneys who have been heretofore mentioned?

[486] A I do.

Q Was or was not any duty assigned to you by Mr. Fant at that time?

A There was.

Q What was it, please?

A The duty that was assigned to myself, as well as the attorneys and Mr. Honea, was that Mr. Fant specifically authorized the four that I have mentioned to negotiate a workable contract that would be fair to both the company and the union with certain reservations.

Q Now, please state what you mean by reservations as used by you.

A There were three that I recall definitely that Mr. Fant said that he would not sign a contract that contained those clauses; one, an arbitration clause; two, a strike clause, a lockout clause where there was no penalty attached; and, three, that he would not accept seniority as the sole governing factor in making promotions, demotions, discharges — not discharges, promotions, demotions, recalls or layoffs.

Q Was any other instruction given the representatives of the company who were charged with the obligation of negotiating a contract?

A There were other instructions given that I considered as minor.

Q Please relate any that may occur to you at this time.

* * * *

[492] Q (By Mr. Fisher) Did or did not Mr. Fant tell you or instruct you that he wanted a contract negotiated and completed?

A He did.

Q During the progress of the negotiations, which are shown by the exhibits mentioned, did or did not Mr. Fant at any time renew his instructions to you or any of the others mentioned within your knowledge?

[493] A He did.

Q What did he say to you on those occasions?

A I can't recall the exact words that he might have used, but on numerous occasions, with the four mentioned people, we had had meetings, and I think that each time that we met with Mr. Fant, it was his explicit instructions that a contract be negotiated.

Q And what kind of a contract insofar as arbitration is concerned?

A There was always the point, the three points that I mentioned before, that he would not sign a contract with those clauses contained therein.

* * * *

[497] Q (By Mr. Fisher) Now, Mr. Martin, state whether or not at the time of the election any employees on the job at Fant Milling Company were wearing union buttons.

A They were.

Q State whether they were many or few.

[498] MR. WELLS:

I object.

MR. THOMPSON:

I object also. It is immaterial what the employees were wearing at the time of the election which, in point of time, was far prior to the proceedings here in question, far prior to any allegation contained in the complaint. Further —.

TRIAL EXAMINER:

I don't see the relevancy, Mr. Fisher. I will sustain the objection.

MR. FISHER:

We desire to make an offer of proof that a very substantial number, probably 40 to 45 percent, of the employees were at the time of the election regularly wearing union buttons while engaged in their work at the plant.

TRIAL EXAMINER:

Well, as they had a right to do, I suppose. I just don't think it is relevant to the issues here. What is the significance to be drawn from that?

MR. FISHER:

We expect to follow that up with other evidence by this witness with reference to the wearing of buttons, that they were worn after that time, which would be involved in the next question. They continued to wear them up until the time to be fixed by the witness. It is intended to show a desire on the part of the employees, coming at a later date, not the date now inquired about —

TRIAL EXAMINER:
You are leading up to your contention that essentially a majority of the employees deserted the union?

MR. FISHER:
That is correct, and desired that the company not contract with the union.

[499] TRIAL EXAMINER:
I don't think you can show that by showing how many union buttons were worn. I sustain the objection and reject your offer of proof.

MR. FISHER:
Thank you, sir. Now, Your Honor, I would like to make it short, but I would like to ask this other question in order to make the additional offer of proof which has heretofore been suggested.

TRIAL EXAMINER:
Yes, you go right ahead.

Q (By Mr. Fisher) Mr. Martin, did there or did there not come a time when you personally observed, by walking through the plant, whether or not any union buttons were being worn by any employees?

A Yes, sir.

MR. THOMPSON:

Before you continue, Mr. Fisher, may I interrupt just a moment?

Is this to be considered as part of the offer of proof?

TRIAL EXAMINER:

Yes, this is in support of Mr. Fisher's offer of proof. He is simply completing his offer in question and answer form.

MR. THOMPSON:

All right. Pardon me.

Q (By Mr. Fisher) When was that, please, or about when?

A In answering the question, are you asking me when that I noticed —

Q Yes.

A — the lack of union buttons?

[500] Q Yes, sir.

A Well, it was sometime during the latter part of August and the first part of September 1954.

Q What did you do, if anything, in an effort to determine for yourself whether or not any of the employees were wearing union buttons at that time?

A By personal observation.

Q State whether or not any of the employees were at that time wearing buttons on the job.

A Very few.

Q How many by number, please?

A I didn't count the number, but, oh, I would say from my recollection seven or eight in the entire plant.

MR. FISHER:
That is the end of our offer of proof, Your Honor.

TRIAL EXAMINER:
Yes, sir.

MR. FISHER:
And we do desire that proof be in evidence.

TRIAL EXAMINER:
I have rejected it.

Q (By Mr. Fisher) Mr. Martin, during the month of September or about that time, 1954, did you or did you not receive any information concerning the desire of the employees to have or not to have a contract with the union?

A I did.

Q Please relate in your own way from whom and how you received such information.

[501] A On the morning — I don't remember the date of the meeting in September — I was getting ready to leave the plant to go to Mr. Gillespie's office for a negotiation meeting. I was stopped and asked by the elevator superintendent if I could come down in the elevator and look at some machinery that had recently been installed that was not operating perfectly, and I told him I couldn't at that particular time, that I had to be in Mr. Gillespie's office at 9:30, I believe it was, or sometime in the morning. I won't set the time exactly because I don't remember. And he said, "What are you going up there for?"

And I told him this was another negotiating meeting between the union representatives and the company. In his own words he told me —

MR. WELLS:

Just a moment, if the Court please. We object to any hearsay statement by some elevator superintendent, some other representative of management, to this representative of management with respect to his opinion as to the majority status or lack of it.

MR. THOMPSON:

General Counsel joins in the objection.

TRIAL EXAMINER:

Yes, Mr. Fisher, I think you should ask, as a result of this conversation with the elevator superintendent, what happened rather than have him testify as to the conversation itself.

MR. FISHER:

Yes. Of course, we expect to show the development following that conversation and other conversations, [502] and we do hope to prove and now offer to prove what information was given this vice president and assistant general manager charged with the duty of obtaining a contract from the union, and it is for that purpose that it is offered. Of course, it is our position and we expect to prove that the information was relied upon, and we think that takes it out of the hearsay rule.

TRIAL EXAMINER:

All right. Go ahead for a minute and see whither we are drifting. I am a little bit doubtful about the propriety of this, but I will permit it for the moment.

MR. FISHER:

Will you read the question to the witness, please, Miss Gwen.

MR. WELLS:

I believe he was in the middle of an answer and I believe I interrupted.

MR. FISHER:

Then, read the part of the answer that has been stated by the witness.

(Answer read.)

Q. (By Mr. Fisher) Please proceed, Mr. Martin.

A He told me that it seemed we were wasting our time to continue negotiations as he had definite information that the employees no longer desired to be represented by a union. I asked him where he obtained that information. He said, "Well, I talk to these boys a lot more than anybody else in this plant, and I have gained it directly from them."

Q What was his name, please?

A Claud Atnip.

[503] Q Is he still a superintendent at the plant?

A He is.

MR. WELLS:

We move to strike the whole answer.

MR. THOMPSON:

And we join in the motion to strike.

TRIAL EXAMINER:

Yes. The motion is overruled and I will let it stand.

Q (By Mr. Fisher) Mr. Martin, did you or did you not proceed to the negotiating meeting that you referred to?

A I did.

Q Can you identify that meeting by date?

A I don't believe I can, Mr. Fisher.

Q Mr. Martin, it is stated to you that the evidence in this case under stipulation of the parties shows that there was just one bargaining conference held during the month of September, and that was on September 17, 1954.

MR. WELLS:

What exhibit number is that, please, sir?

MR. FISHER:

Our copy is not marked.

MR. GILLESPIE:

Respondent's 18.

Q (By Mr. Fisher) That it was held at Mr. Gillespie's office, and that it was 10:30 o'clock a. m. on that date when the meeting commenced. Now, assuming that evidence to be correct and that statement of the evidence to be correct, can you fix the approximate time?

A I can.

Q All right, sir. Will you do it?

[504] A September 17, 1954.

Q And as to the hour?

A 10:30 a. m.

Q This is the hour of the meeting. As to the time of your conversations —

A It was shortly before that. It only takes about five or ten minutes to get to Mr. Gillespie's office.

Q Now, Mr. Martin, after that meeting on September 17 and at any time prior to November 19, 1954, was anything done by you or Mr. Fant, meaning by Mr. Fant, to your knowledge, with reference to ascertaining the desire of the employees with reference to a union contract?

A I don't believe that Mr. Fant was present at the meeting between the supervisory personnel, Mr. Gillespie, Mr. Honea, Mr. Fisher and myself, trying to determine if the information which I had received was correct as to the waning interest of the employees, as far as union activity was concerned.

Q What was done?

A The supervisory personnel was questioned very closely to determine if the information that I had gotten was correct, which it was so stated that it was as far as could be determined by conversation, by personal observation, that it was true that the employees had more or less forgotten the union activity.

MR. WELLS:

Now, we move to strike the hearsay testimony of the witness as to some alleged statements by unidentified [505] supervisory personnel allegedly communicating what some unidentified employees in turn said to them. It is hearsay twice removed. Beyond that, it is a statement by such twice removed hearsay an attempt to state conclusion of the state of mind of the employees. It deprives us of any right to cross-examine.

MR. THOMPSON:

General Counsel joins in the objection and also the motion to strike.

MR. FISHER:

And in connection with the objection, counsel for the respondent respectfully shows to the Hearing Officer that it is extended by the next question to identify the supervisory personnel referred to by the witness.

TRIAL EXAMINER:

Well, I don't know that mere identification would make much difference on the grounds of the objection I take it that these questions are asking now, which in essence are hearsay up to a certain point, are intended to show the motivation of the company in its later refusal to meet with the union. That is my assumption.

MR. FISHER:

Yes, and that is the reason that we take the position that it is without the hearsay rule.

TRIAL EXAMINER:

I will take it on that basis. I will overrule and deny the motion to strike.

Q (By Mr. Fisher) Mr. Martin, will you please name the supervisory personnel that you referred to?

MR. WELLS:

May we have a continuing objection to such testimony without the necessity of repeating it each time?

[506] TRIAL EXAMINER:
Yes.

MR. WELLS:
Thank you.

A Ben Blackburn, general superintendent of Fant Milling Company, Johnny Koon and Ralph Robertson, co-superintendents of the feed mill, Fant Milling Company, and Claud Atnip, elevator superintendent of Fant Milling Company.

Q (By Mr. Fisher) Now, Mr. Martin, was or was not this information at any time prior to November 19, 1954, communicated to Mr. Fant?

A It was.

Q By whom?

A By myself.

Q There is an exhibit in evidence, I believe General Counsel's Exhibit 18, which I desire to exhibit to you for the purpose of the next question. It is Exhibit 28 instead of 18. Mr. Martin, you now have a copy of General Counsel's Exhibit 28?

A I do.

Q Please state whether or not you have seen that document before.

A I have.

Q Please state the first time that you saw it.

A On November 19, 1954.

Q By whom was it dictated?

A By Mr. James A. Fant.

Q Were you or were you not present at the time it was dictated?

[507] A I was present.

Q Was or was not that exhibit posted at the plant?

A It was.

Q In one place or more than one place?

A More than one.

Q And what places, please?

A The flour mill and feed mill bulletin board.

Q Now, Mr. Martin, please state whether or not Fant Milling Company has a mill at any point or other place than Sherman.

A They do, Gainesville, Texas.

Q Was or was not General Counsel's Exhibit 28, meaning the part signed by Mr. Fant, since it is in two parts, posted at the Gainesville plant?

A It was.

* * * *

[512] Q Now, on or about October 4 or 5, 1954, did you or did you not, during a coffee break, at or near the commissary at Fant Milling Company, see Mr. Wellborn and have a conversation concerning a contemplated wage raise?

A We did.

TRIAL EXAMINER:

Is this on or about October 4? Is that the date?

MR. FISHER:

On or about October 4 or 5. I am not looking [513] at it. I think maybe it is fixed in the testimony. Mr. Wellborn says it is October 5.

Q (By Mr. Fisher) Mr. Martin, at that time, meaning the time of the conversation between you and Mr. Wellborn, had Mr. Fant, as president and general manager of the company, stated to you and other supervisory personnel or representatives of management at the plant that he was willing to put in a raise or desired to put in a raise?

A He did.

Q What raise had he said that he was willing to put in or desired to put in effect?

A Seven cents an hour to all operating personnel.

Q When, with reference to the time that you saw Mr. Wellborn, had you, as the assistant to Mr. Fant, learned that he was willing or agreeable to putting in effect of such wage increase, whether it was the same day or the day before or some other time?

A I can't recall the exact day, but it was either the 4th or 5th of October.

Q Now, sir, about what time of day did you see Mr. Wellborn?

A I imagine it was around 10:30. That is the usual time that we are at the commissary for coffee.

Q What if anything did Mr. Wellborn say to you with reference to the contemplated wage increase?

A Mr. Wellborn asked me had we given the plant employees a [514] seven cent an hour raise, and I told Mr. Wellborn that Mr. Fant had authorized a seven cent an hour raise.

Q Was anything further said between you and Mr. Wellborn?

A Yes, sir.

Q Please state what it was.

A Mr. Wellborn asked me if I was not aware of the fact that I should have consulted him in the matter of increasing wages at the plant before doing so.

Q What did you say to him?

A I told him, I said, "Roy, I have increased wages at plants before without consulting you and had no objection."

* * * *

Q (By Mr. Fisher) Mr. Martin, I hand you Respondent's [515] Exhibit No. 22 for identification and ask you, sir, if you have seen that document or notice at any time before?

A Yes, sir.

Q Where did you see it first?

A Mr. Fant's office.

Q Did you see it at any time after that?

A Yes, sir.

Q Where did you next see it?

A On the bulletin board at Fant Milling Company in the flour mill and feed mill.

Q When, with reference to the time of your conversation — strike that, please.

When you say you saw it on the bulletin boards at Fant Milling Company, state whether or not it was posted on the board at that time.

A It was posted, yes, sir.

Q State when, with reference to the time that you had the conversation with Mr. Wellborn on or about October 4th or 5th, this notice, Respondent's Exhibit No. 22 for identification, was posted.

A October 6th, 1954.

* * * *

[524] Q Thank you, sir. Now, Mr. Martin, I will ask you, sir, if you recall any alteration or change of wages about April 1954 with reference to the creation of differentials between certain employees.

A I do.

Q What were those changes, please, if you remember, without reference to any record?

A It was a change of shift differential pay. I don't recall the amounts. I think probably there was one cent variance between the standard contract rates and what Fant Milling Company was paying at that time.

Q Now, was there any spread created between any employees at that time by an alteration of wages?

A There was a spread at that time, yes, sir.

[525] Q Who, if anyone, first suggested the making of such differentials?

A You are talking now between job classifications?

Q Yes.

A I don't know whether it was Mr. Wellborn or Mr. Cox that was at that particular meeting.

MR. THOMPSON:

I object to the answer. We are going back into the transcripts again if he is testifying about a particular meeting.

MR. FISHER:

I don't think the transcript would answer that particular question. The question is who was the first person that suggested it. I think the testimony taken with the transcripts will show it.

TRIAL EXAMINER:
Yes, I think that's right.

MR. FISHER:
But not the transcripts alone.

THE WITNESS:
I can't answer the question. I will make it this way; it was a union representative.

Q (By Mr. Fisher) Had or had not the company or the management of the company, so far as you know, considered establishing the differentials established in April until such differentials were suggested by the union representative, either Mr. Cox or Mr. Wellborn?

A That had been considered, yes.

Q When had it been considered?

A It had been discussed, I would say, some three or four [526] months before that.

Q And after it was discussed at the negotiating meeting and the suggestion was made by Mr. Wellborn or Mr. Cox, whichever it was, was that reported to Mr. Fant?

A It was.

Q What was his reaction to that suggestion by the union?

A That it was put into effect.

Q And was it put into effect?

A It was.

* * * *

CROSS EXAMINATION

Q (By Mr. Thompson) . . .

* * * *

[527] Q I see. Now, concerning your conversation with Mr. Wellborn [528] in October, early in October, I believe you testified you didn't remember the exact date. Is that correct?

A That's right.

Q But it was about October 4th or 5th?

A That's right.

* * * *

[529] Q I believe you also testified that at the time you talked to Mr. Wellborn, the decision had been made to give the raise; is that correct?

A That's right.

Q At the time the decision was made to give the raise, was notice in any form given to the union?

A No.

Q Did you seek Mr. Wellborn out on that date or did Mr. Wellborn seek you out on that date?

A Mr. Wellborn sought me out on that date.

Q Now, tell us again, if you will, to the best of your memory, exactly what was said during this conversation between Mr. Wellborn and yourself.

A Mr. Wellborn came to the commissary. I was in the commissary having coffee. I got up and walked over, and he said, "Could I see you a few minutes?"

And I said, "Certainly."

He said, "I hear that you have given a seven cent raise to the employees."

I said, "That is correct."

He asked me, he said, "Aren't you aware that you should have contacted or told me or discussed it with me about giving the employees a raise?"

[530] I told him, I said, "Roy, I had given raises before without contacting you and you had no objection."

Q Was anything else said at that time concerning that raise?

A I don't think so.

Q Now, when you said to him, as you have just testified, "Roy, I have given raises before," were you referring to raises that you gave when you were employed by someone other than Fant?

A That's right.

Q You weren't referring to any raises that had been given while employed by Fant?

A No.

Q All right. Concerning this adjustment in shift differentials made in I think it was April of 1954 about which you testified, you say it was suggested by one of the two gentlemen, the two union representatives, either Mr. Wellborn or Mr. Cox; is that correct?

A That's right.

Q You don't remember which one, but one of them.

A I don't remember which one of them.

Q Was a suggestion made at one of these negotiating meetings?

A That's right.

Q The decision to make the adjustment was made not at a negotiating session, however; isn't that correct?

A That's correct.

Q And the exact amount was determined apart from negotiating [531] sessions, was it not?

A That is correct.

Q Now, when it was decided, I think you testified that Mr. Fant decided to make the adjustment; is that correct?

A That is correct.

Q When it was decided to actually make the adjustment, was the union or its representatives notified thereof?

A No.

Q Were they notified before it was actually made effective?

A No.

Q Subsequent to the —

MR. FISHER:

Excuse me, Mr. Thompson. Am I correct that the last inquiry was with reference to the April differentials?

MR. THOMPSON:

Yes, sir.

MR. FISHER:

And not to the raise of October 6?

MR. THOMPSON:
That's right.

* * * *

[533] Q (By Mr. Wells) Mr. Martin, directing your attention to the wage increase of early October 1954, when did you first learn that such wage increase was contemplated?

A Contemplated?

Q Yes, sir.

A Oh, several days before.

Q How did you first learn that there was any thought of a wage increase at all?

A In conversation with Mr. Fant.

[534] Q Did he initiate it or did you initiate it, the idea of a wage increase?

A Neither.

Q Who did?

A Other concerns in this town.

Q When?

A Several days before October 4.

Q Well, as long as several weeks before?

A Oh, I won't say several weeks. I said several days. I don't know exactly how many days.

Q But the matter was under consideration by the Fant Milling management for a matter of a substantial length of time before it was put into effect?

A That's right.

* * * *

[535] Q (By Mr. Wells). Had you had any discussion with Mr. Fant about wage increases prior to the time that you had the discussion with him in which there was some reference to other industries in town?

A In the general course of business, you are continually discussing things of that nature with management.

Q Yes, sir. And you had reported back to Mr. Fant after almost every bargaining session that one of the union's requests was a wage increase, had you not?

A No, sir.

Q You hadn't told him that?

A No, sir.

Q Did you ever report to him that the union desired a wage increase?

A Oh, yes.

Q And what was his reaction to that?

A I can't remember exactly what his reaction was, that we were probably the one — I think maybe I can answer that, too, that we were paying top wages at the present time, or equal wages with other industries in this area.

Q Would it be fair to say that when you discussed the matter on these various occasions with Mr. Fant, prior to late September [536] or early October 1954, Mr. Fant's position on a wage increase was negative?

A Not necessarily.

Q What do you mean by not necessarily?

A Maybe it was, maybe it wasn't.

Q Do you have any recollection?

A You are the one that said it was negative, not me.

Q Do you have any recollection about that, about whether it was negative or positive, that is, whether he was against the wage increase or for a wage increase?

A Mr. Fant has never been against a wage increase.

Q Did he indicate that he was willing to put into effect a wage increase prior to late September 1954?

A That's right.

Q When?

A Several days before.

Q How long before?

A I can't answer that definitely.

* * * *

[540] TRIAL EXAMINER:

So far as you know, Mr. Martin, if I am summarizing your testimony incorrectly, please tell me, but this is my very definite impression as of now that you and Mr. Fant had discussed a possible increase prior to October 4.

THE WITNESS:

That's right.

TRIAL EXAMINER:

An appreciable period before that because of the possibility or actual granting of increases by other employers in the community.

THE WITNESS:

That's right.

TRIAL EXAMINER:

And that finally on October —

MR. FISHER:

6th.

[541] TRIAL EXAMINER:
— 6th, you definitely decided to grant the seven cents an hour general increase.

THE WITNESS:
That's right.

TRIAL EXAMINER:
And posted a notice to that effect.

THE WITNESS:
That's right.

TRIAL EXAMINER:
Signed by Mr. Fant and your superintendent.

THE WITNESS:
That's right.

TRIAL EXAMINER:
And that on October 6th, you decided, you two, Mr. Fant and yourself, that the increase should be made effective as of October 4.

THE WITNESS:
That's right.

TRIAL EXAMINER:
And that so far as you know, no one other than you and Mr. Fant knew about your decision on October 4.

THE WITNESS:
No, sir, I can't say that that is true, but I don't know

that it was generally known throughout the United States, I guess. That sounded general to me.

TRIAL EXAMINER:
No. What Mr. Wells means is, in effect, was there enough general knowledge in the plant or in the community for the fact to have come to Mr. Wellborn's attention through members of his union or elsewhere, through gossip or rumor or by —

THE WITNESS:
Well, I can say that that would be possible, but I don't know it to be true.

TRIAL EXAMINER:
All right.

Q (By Mr. Wells) Are you at all precise about these dates in [542] early October, Mr. Martin?

A I beg your pardon?

MR. FISHER:
That is objected to.

Q (By Mr. Wells) Are you willing to be bound that you are exact and precise in your testimony as to these dates —

MR. FISHER:
That is objected to as argumentative.

TRIAL EXAMINER:
I will sustain the objection. Is there any question in the mind of the General Counsel or the union that the notice dated October 6, 1954, which is now in evidence as Respond-

ent's Exhibit 22, is there any doubt in your minds that this was posted on the date shown, October 6? Is that a fact?

MR. WELLS:
It was our information or our understanding that the wage increase actually was agreed upon and there was general knowledge of it on the 4th.

TRIAL EXAMINER:
Yes. I think I understand your contention there. Mr. Martin says, however, that he and Mr. Fant made the final decision on the 6th.

MR. THOMPSON:
I don't think he did either on direct or cross examination.

TRIAL EXAMINER:
I just questioned him on that. I myself just questioned Mr. Martin and he said that was it.

MR. THOMPSON:
I think if we went back to that particular point —

TRIAL EXAMINER:
I want to get it straight because to me it [543] is an important matter.

MR. THOMPSON:
It was my understanding that the decision had been made to grant the increase sometime prior to the date the notice was put up.

THE WITNESS:

That's right.

TRIAL EXAMINER:

That's right.

MR. THOMPSON:

That it was actually posted on the 6th, but the decision had been made before the 6th some two or three or four days before the 6th. In other words, at any rate, at the time Mr. Martin was talking with Mr. Wellborn in the commissary, the decision was a firm one that the increase would be granted. The amount had been decided upon. The only thing remaining, according to the witness, as I understand his testimony both on direct examination and cross examination, the only thing that remained to be done when he was talking to Mr. Wellborn was to actually put that notice on the bulletin board.

TRIAL EXAMINER:

That is why I inquired so closely a moment ago, because we seemed to be getting away from what Mr. Martin's actual testimony was.

When was the actual decision made, Mr. Martin, to put the general wage increase into effect? When was that decided?

THE WITNESS:

Let me get that question separated distinctly. Now, the wage rate was put into effect retroactive to October 4.

TRIAL EXAMINER:
Yes, we all understand that.

THE WITNESS:
The notice was written and given and posted on [544] the morning of the 6th. Did I answer your question?

TRIAL EXAMINER:
Not fully. When was it decided that the general wage increase would be made without regard to when it was to be made effective or put into effect, but when was it decided that you would grant a general wage increase of seven cents an hour? Was that prior to October 4?

THE WITNESS:
That's right.

TRIAL EXAMINER:
And how long before October 4?

THE WITNESS:
I can't answer that exactly on a definite date, but several days.

TRIAL EXAMINER:
All right.

MR. THOMPSON:
That was my understanding, Mr. Examiner.

TRIAL EXAMINER:
I am cleared up now.

Q (By Mr. Wells) Did Mr. Fant ever indicate to you any kind of arbitration procedure provision which he would be willing to agree to?

A In what respect?

Q Any respect.

A He agreed to a grievance procedure but not —

Q I say arbitration.

A But not by arbitration, no, sir.

Q Your instruction from Mr. Fant was, then, that you were not to agree to any type of arbitration procedure?

A Right.

* * * *

GENERAL COUNSEL'S EXHIBIT No. 2

COPY

August 2, 1953

Mr. Fred Honea, Secretary
Fant Milling Company
Sherman, Texas

Dear Sir;

As the legally elected Representative of your Employees it now becomes our responsibility to negotiate with your Company for a Contract covering hours of employment, rates of pay, working conditions and other conditions of employment.

We would like to suggest a conference for 9 A.M. Thursday, August 13, 1953, either at your office or at the Grayson Hotel in Sherman.

Thanking you, we are,

Very Truly yours,

AMERICAN FEDERATION OF
GRAIN MILLERS (AFL)

Roy O. Wellborn, Vice President

ROW/d
cc/W. H. Henderson
W. M. Morris

GENERAL COUNSEL'S EXHIBIT No. 3

AGREEMENT

FANT MILLING COMPANY
and
AMERICAN FEDERATION OF GRAIN MILLERS

PREAMBLE

Paragraph: 1. The parties to this Agreement are the Company, Fant Milling Company of Sherman, Texas, and the Union, American Federation of Grain Millers (AFL), including the International Union and it's affiliated Local Union No. 64 of Sherman, Texas.

Paragraph: 2. Purpose. The purpose of this agreement is to promote and insure harmonious relations, cooperation and understanding between the Company and its employees, to encourage economy of operation, elimination of waste, cleanliness of Plant, protection of property and safety of employees; to insure true collective bargaining and to establish standards of hours and working conditions, and to provide for the establishment of rates of pay, and to that end the Company pledges itself to give to its employees considerate and courteous treatment, and the employees in turn pledge themselves to render the Company loyal, efficient and cooperative service.

Paragraph: 3. Recognition. The Company recognizes the Union as the sole collective bargaining agent for its Employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided, however, that this recognition shall not apply to Employees in other recognized bargaining units or to employees whose duties and responsibilities classify them as supervisors, office employees, Laboratory Employees, buyers, salesmen, and employees taking the Company's regular training course for supervisory service, provided, however that trainees doing work to learn a job shall in no way displace or otherwise disturb the status of a regular employee who would normally work the job.

Paragraph: 4. Checkoff. The Company shall deduct Union dues from the pay of all employees who shall have voluntarily authorized such deductions in writing. Deductions may be made from the employee's first pay each month and shall be remitted to the Union promptly. Each authorization given under this Article shall be irrevocable for one year from its effective date or until the expiration, termination, renewal or extension of this agreement, whichever occurs sooner. In the event this agreement is renewed or extended with a similar checkoff provision, then after thirty (30) days from the effective date of each such renewal or extension the authorization of each employee, unless revoked in the meantime, will automatically become irrevocable for a further period of one year or until the expiration, termination, renewal or extension of such agreement if renewed or extended, whichever occurs sooner.

Paragraph: 5. *Work Week and Work Day.* The work week for the plant shall begin each Monday at 7:00 A. M. A day shall be considered as twenty-four (24) hours beginning at 7:00 A. M. Eight (8) hours shall constitute a normal day's work. Forty (40) hours consisting of five (5) consecutive days of eight (8) hours each normally Monday through Friday, shall constitute a normal week's work.

Paragraph: 6. *Weekly Overtime.* Time and one-half shall be paid for hours worked in excess of forty (40) hours in any work week.

Paragraph: 7. *Daily Overtime.* For the period from Monday through Friday of any week excluding holidays, time and one-half shall be paid for hours worked in excess of eight (8) in any day, and the eight (8) hours shall not be staggered with the exception of time off for meals.

Paragraph: 8. No Staggered Work Week. The Company agrees that the work week shall not be staggered in such a manner as to deprive employees of overtime they would normally receive. Pay for recognized holiday time will not disqualify the employee from receiving the overtime rate for time in excess of forty (40) hours

Paragraph: 9. Shift Differential. A shift differential shall be paid for all work performed on the second shift in the amount of six cents (6c) per hour and on the third shift in the amount of eight cents (8c) per hour, and such shift differential shall be used in computing overtime and premium time.

Paragraph: 10. Sunday Work. All work performed on Sunday shall be paid for at two times the straight time hourly rate of pay.

Paragraph: 11. Recognized Holidays. Holidays shall be New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. If any of these established holidays falls on a Sunday, the following Monday in all cases will be considered as the holiday in the administration of the pay provisions of this Agreement.

Paragraph: 12. Holiday Work Pay. All work performed by an employee on holidays listed in Paragraph 11 shall be paid for at the rate of two and one-half (2½) times his straight time hourly rate.

Paragraph: 13. Unworked Holiday Pay. Employees, will be paid eight (8) times their straight-time hourly rate for the holidays listed in paragraph 11 if no work is performed on these holidays.

Paragraph: 14. Holiday Time Credit. An Employee entitled to pay for a holiday not worked, as defined above, shall also be credited with eight (8) straight-time hours on that holiday for the purpose of computing his overtime pay under Paragraph 5.

Paragraph: 15. Reporting Pay Minimum. An Employee called to or reporting for work (unless otherwise instructed) shall be given four (4) hours' work, or, in lieu of being given that much work, shall be given pay equivalent to the amount he would have received had he worked four (4) hours.

Paragraph: 16. Call Back Minimum. An Employee who has left the plant and is called back to work will be given four (4) hours' work, to be paid for at the applicable overtime or premium rate, or, in lieu of being given that much work, shall be given pay equivalent to the amount he would have received had he worked four (4) hours.

Paragraph: 17. Early Call In. An Employee called to work two (2) hours, or less, prior to the established starting time of his scheduled shift shall be paid only for the time worked on the early call in and at the overtime or premium rate applicable to such hours.

Paragraph: 18. Jury Pay. An employee who is required to be absent from work for jury service shall receive whatever straight-time pay he would have otherwise received up to and including forty (40) hours in any one week, less the amount of jury pay which he received for the same period. When the above is applicable, each full day of jury service shall be credited as one eight (8) hour day in the computation of overtime, and each partial day of jury service shall be credited as a partial day toward overtime. To be eligible for the above payment, the employee must notify his immediate supervisor at the time of his call to jury service and must furnish evidence of the amount of pay received for jury service.

Paragraph: 19. CONTINUOUS Service. The term continuous service wherever used in this agreement is the period of time that begins with an employee's date of hire. If such service is broken for any of the reasons listed under (a), (b), (c) or (d), below. Continuous service shall commence with the employee's most recent hiring date. Continuous service shall not be broken due to lay off or absence due to sickness, injury, leave of absence, or other legitimate reason approved by the company. However, an employee's continuous service shall be broken if he:

(a) Quits, or

(b) is discharged for just cause, or

(c) Has been layed off for a period of twelve (12) consecutive calendar months, or

(d) fails to report within a reasonable time when called, if, in addition the local union is given forty-eight (48) hours in which to locate such employee and arrange for his reporting to work when called.

PARAGRAPH: 20. PLANT SENIORITY. The term "Plant Seniority" as used herein shall mean the period of time reflected by the Company's employment records of an employee's continuous service in the plant covered by this Agreement.

Paragraph: 21. Department Seniority. The term "Department Seniority" as used herein, shall mean the period of time reflected by the Companys employment records of an employee's continuous service in a unit designated as a department in this Agreement.

Paragraph: 22. Filling Vacancies. When a job is vacant the Company will post a notice of vacancy on the bulletin board, this notice shall remain posted for forty-eight (48) working hours. Employees desiring to apply for the position must sign their names to the notice during the above period of time that notice is posted. Failure to do so removes any employee from consideration for the position vacant. If for legitimate reasons approved by the plant superintendent and the Local Union's Committee, employees shall be absent from work during the above forty-eight (48) hours due consideration shall be given the employee for consideration. The Company also agrees to post the name of the employee chosen for such position as soon as possible.

Paragraph: 23. Promotions. Promotions shall be made upon the basis of department seniority first, and then plant seniority, providing that the employee's ability and physical qualifications are sufficient to permit him to perform the duties of the posted classification in a satisfactory manner.

(a) An employee has the right to accept or reject a promotion. However, if an employee rejects a promotion another employee with less seniority may be promoted as outlined above.

(b) An employee accepting a promotion shall be given a fair trial on the new classification and shall be returned to his old position if he is unable to perform the new assignment satisfactorily.

Paragraph: 24. Transfers. Temporary transfers of less than thirty (30) consecutive days to another department, classification, or new classification of work shall not give the employee seniority in that department or classification. Temporary transfers made necessary by the illness, injury or vacation of an employee shall not give an employee seniority in the department or classification to which he is transferred regardless of their duration. In case of a transfer for any other reason for a period longer than thirty (30) consecutive days to another department or classification, the Company and the Local Committee will review such transfer to determine the status of the job and of the employee's seniority. *In the case of a new classification being established* the rate for the new classification will be determined by negotiations between the parties prior to the end of the thirty (30) day period.

Paragraph 25. Layoffs. When it becomes necessary to reduce the working force, temporarily or permanently, department seniority shall first apply, and then plant seniority, with respect to all employees, qualifications being sufficient. The practice will be for the company to retain those employees having the longest department seniority, and the employees not qualifying for retention within the department shall be entitled to exercise their plant seniority. In the consideration of plant seniority it will be the practice for the company to lay off those employees having the shortest period of plant seniority.

Paragraph 26. Recalling layed off Employees. In recalling layed off employees seniority shall prevail and the practice will be that the employee with the longest plant seniority shall be recalled first. Failure to report in a reasonable time when called, or failure to advise the Company of a change of address may be cause for removal from consideration. In no event shall a man be removed from consideration because of failure to report within a reasonable time when called unless the Local Union is given forty-eight (48) hours in which to locate such employee and arrange for his reporting to work.

Paragraph 27. Probationary Employees. Employees shall be regarded as on probation for the first thirty (30) calendar days of their employment. Upon completion of the probationary period, the employee's seniority shall be retroactive to the beginning date of his last period of continuous employment. There shall be no Company responsibility for re-employment or continued employment of probationary employees.

Paragraph 28. Temporary Employees. When it is necessary for the Company to hire additional employees for work in connection with special project, or during harvest seasons, such employees shall be considered temporary employees even though the life of the project, or harvest season, runs in excess of thirty (30) calendar days. At the end of such period, there shall be no Company responsibility for re-employment or continuing of employment of such temporary employees.

Paragraph 29: Rate for Temporary Transfers. Where employees are temporarily assigned to higher rated jobs, the employee will be paid for the rate of the higher job even though he has not previously qualified on that job. However, payment of the job rate in such circumstances will not in anyway establish that the employee has qualified on the higher job, so that if he subsequently advances to the higher job by promotion or bid he will not be deemed qualified for the job until he satisfactorily performs the duties with no more supervision that is required by other qualified workers on the same job. Whenever an employee's services are not required in his regular classification and he exercises his seniority to take work in another classification, then the employee will receive the wage rate for the classification of the work performed.

Paragraph 30: Leave of Absence. The Company shall notify the Local Union in writing of leave of absence granted and the termination of employment of regular employees covered by this Agreement.

Paragraph 31: Vacations. An employee shall become eligible for a vacation in accordance with the following schedule:

(a) Upon completion of one (1) year of continuous service with the Company, an employee will become eligible for one (1) week's vacation, which shall be taken during the twelve (12) month period following the anniversary of his date of employment.

(b) Upon completion of two (2) years of continuous service with the Company, and during each calendar year thereafter until the calendar year in which he becomes eligible for three (3) weeks' vacation, an employee will be granted two (2) weeks' vacation.

(c) Upon completion of ten (10) years of continuous service with the company, and during each calendar year thereafter, an Employee will be granted three (3) weeks' vacation.

Paragraph 32: Vacation pay will not be based on either higher or lower rates of pay occasioned by temporary shifts to other classifications of work, unless such higher or lower rates have been continuously in effect for at least six (6) months prior to the vacation period.

Paragraph 33: If a holiday falls during an employee's vacation period, he shall receive any holiday pay for which he is eligible in addition to his vacation pay.

Paragraph 34: If an employee desires to draw his vacation pay in advance, it will be paid to him not later than the last pay day before his vacation begins.

Paragraph 35: Vacations will be granted at such times of the year as the Company finds most suitable, considering both the wishes of the Employees and the requirements of plant operation.

Paragraph 36: Vacations for employees with two (2) years or less of continuous service with the Company may be anticipated when it is for the mutual convenience of the employee and the Company.

Paragraph 37: Vacations cannot be postponed and allowed to accumulate from year to year.

Paragraph 38: Employees cannot waive their vacations and draw double pay by working during the time allowed.

Paragraph 39: In the event an Employee's services with the Company are terminated for any reason other than for discharge for just cause, vacation pay will be granted for any vacation not taken during the calendar year, for which the employee would have been eligible at the date of termination. Where termination is by death, the payment will be made to the same individual to whom is paid any accrued wages.

Paragraph 40: Grievance Procedure. Promptly after the acceptance of this agreement, a Labor Relations Committee composed exclusively of citizens of the United States of America shall be established in the following manner:

The Local Union shall select from each major department of the Company's plant in question a Shop Steward who has been in the continuous service of the Company for at least one year. These Shop Stewards and at least one officer of the Local Union shall constitute a Stewards' Committee which shall meet monthly with representatives of the Company. The Stewards' Committee and the Company representatives, as described, meeting together shall constitute the Labor Relations Committee for the plant. The purpose of these Committee meetings is to discuss any plant affairs that are of mutual concern to both parties and to deal with any grievance that may have arisen.

It shall be the duty of the Labor Relations Committee to give immediate attention all grievances brought before it. In general, Company grievances shall be processed in the same manner as employee grievances.

Should any misunderstanding or grievance arise, an earnest effort shall be made to settle the matter promptly in the following manner:

Paragraph 41: First Step. By conference between the Employee(s), with or without the Shop Steward, and the immediate supervisor. If no satisfactory settlement is reached, then

Second Step. By conference between the Shop Steward in the Employee's respective department and the department head, with or without the Employee's immediate supervisor. (No grievance will be adjusted beyond the first step outlined above unless the Union has first been notified of such grievance and has been given the opportunity to be present at the adjustment.) If no satisfactory settlement is reached, then

Third Step. It may be presented to the Labor Relations Committee. If no satisfactory settlement is reached, then

Fourth Step. It may be referred to the International Union and Company Executives for settlement. If no settlement is reached then the grievance may be referred to by either party.

Paragraph 42: Arbitration: In the event a question is referred to arbitration, an impartial Arbitrator shall be selected immediately by the parties hereto. The Arbitrator shall have authority to act only with respect to grievances relating to the interpretation or application of the provisions of this Agreement and any Supplemental Agreement, and his decision shall be final and binding on all parties involved.

Paragraph 43: It is agreed that no grievance shall be subject to arbitration unless it has been processed through all the steps of the grievance procedure as outlined in Paragraph 41.

Paragraph 44: Arbitration may not be resorted to as a substitute for negotiations provided for in this Agreement.

Paragraph 45: Each party shall pay its own expenses incurred in arbitration. All other expenses of arbitration, including the fees and expenses of the Arbitrator, shall be borne equally by the Company and the Union.

Paragraph 46: During any dispute, complaint, or grievance, the Employee (s) concerned shall continue to work under the conditions existing prior to the time the dispute, complaint, or grievance arose, unless discharged by the Company.

Paragraph 47: If the Arbitrator shall find that an Employee has been unjustly discharged, he shall be given an opportunity to return to work. If he also finds that he should be paid for any time lost, such time shall be determined by the Arbitrator.

Paragraph 48: Working Conditions. The Union and the Company shall make every reasonable effort to prevent occupational diseases and health hazards. The Union and the Company further agree to make every reasonable effort to comply with safety rules and regulations and to put forth every effort to keep the plant, lavatories, and the rest rooms in a clean and sanitary condition.

Paragraph 49: Bulletin Board. The Company shall have a bulletin board in each department of the plant and the Union shall have the privilege of the use of such bulletin boards for the posting of proper union meetings or other material of interest to the employees; but no notices by the Union other than that of meetings shall be posted except such as are signed by duly authorized officers of the Union and approved by the Management.

Paragraph 50: Injuries. Any employee compelled to go home by reason of injuries received on the job shall receive a full day's pay for that day, regardless of the amount of time actually worked.

Paragraph 50: Departments, Classifications and Rates of Pay.

Paragraph 51: Term of Agreement. This Agreement shall become effective on the ——— day of —————, 1953, and shall be operative and remain in full force and effect until the 1st day ——————, 1954, and thereafter from year to year commencing —————— 1 of any year, subject, however, to the right of either the Union or the Company to terminate or move to amend this Agreement on ———— 1, 1954, or at the end of any yearly period in the manner hereinafter set forth:

(a) Either party hereto may terminate this Agreement on ———— 1, 1954 or at the end of any yearly period thereafter, by giving written notice to the other party sixty (60) days prior to ———— 1, 1954

or the end of any yearly period, said termination to become effective on ________________ 1, 1954, or at the end of any said yearly period.

(b) Either party hereto may move to amend this Agreement by giving written notice of intention to amend sixty (60) days prior to ____________ 1, 1954, or to the anniversary date of any yearly period thereafter, said notice to indicate generally the matter of proposed amendment. Negotiations to amend or modify shall begin at least forty-five (45) days before said anniversary date. The Agreement shall then continue for a period of one year from said anniversary date and from year to year thereafter, unless terminated or again amended under the provisions of this Paragraph, and any amendments shall become part of such Agreement and after the first period of this Agreement shall be retroactive to ____________ 1, 1954, and thereafter to the anniversary date of the previous yearly period.

During the pendency of negotiations, both parties shall be governed by the terms and conditions of this Agreement as they existed at the beginning of the negotiating period.

Paragraph 52: Neither party will make changes in the terms and conditions of employment as set forth in this Agreement during its life, However, this Agreement may be amended or revised in any of its provisions at any time during its existence, provided such amendments or revisions are approved in writing and subscribed to by all parties to this Agreement.

Executed __________, 1953 by Executed __________, 1953

Fant Milling Company.

By ____________________
(Title)

By ____________________
(Title)

American Federation of
Grain Millers AFL

By ____________________
Vice President

By ____________________
(Title)

GENERAL COUNSEL'S EXHIBIT No. 10

FANT MILLING COMPANY

CONTRACT WITH EMPLOYEES

This contract and agreement made and entered into this the ______ day of November, 1953, by and between Fant Milling Company, a Corporation, acting herein by its duly authorized officers hereinafter called Company, and the employees of Fant Milling Company, described in Article 1 hereof, acting by and through American Federation of Grain Millers including its Local Union No. 64, hereinafter collectively referred to as Union, WITNESSETH:
1/8/54 agreed

ARTICLE 1. RECOGNITION. The Company recognizes the American Federation of Grain Workers as the sole and exclusive bargaining agency for those employees within the bargaining unit determined by the National Labor Relations Board __________, 1953 in Case No. __________.
1/8/54 agreed

ARTICLE 2. DISCRIMINATION. There shall be no discrimination, restraint or coercion of any character by the Company, its agents or representatives, or the Union, its representatives or members, against any employee because of his membership or non-membership in the union.
1/8/54 agreed

ARTICLE 3. PURPOSE. The fixed purpose of the Union and the Company as evidenced by this contract shall be to work in harmony for the mutual advantages of the em-

ployees and the Company. To assure the carrying out of that purpose, the parties have expressly agreed to the following specific guarantees:
1/8/54 agreed

A. Notwithstanding the provisions of any other paragraph or clause of this contract, so long as the Union is qualified and acting as bargaining agent for the employees there shall be no lock out by the Company and no strikes by the employees for any reason whatsoever. A lock out as used herein shall mean the deliberate act of the Company to prevent all work by the employees at any time during normal working hours when there are available orders to be filled, raw material to be processed, and sufficient machinery in operating condition for processing purposes. A strike as used herein shall mean any deliberate failure of any one or more of the employees to perform their normal work at any time when work is available to be performed.

B. It is further agreed that in the event of a lock out the Company shall pay to each employee on the payroll as of the day of such lock out one two hundred fiftieths (1/250) of such employees total compensation for the preceeding twelve calendar months for each day such lock out continues.

C. In the event of a strike the Union shall pay to the Company one two hundred fiftieths (1/250) of the total compensation of all employees absent from work due to such strike for the preceeding twelve calendar months for each day such strike continues.

D. No representative, agent or member of the Union shall instigate, authorize or condone any employee's failing to work to the full extent of his ability during any regular work period.

ARTICLE 4. HOURS OF WORK. A normal work week in the operation of the mill shall be forty (40) hours, however there is no guarantee of any minimum number of hours of work to any employee.
4/2/54 as agreed

ARTICLE 5. WAGES. The Company shall pay the scale of wages now in effect during the life of this agreement, but shall have the right to increase the wages of any one or more or all of the employees at any time.
4/2/54 as agreed

ARTICLE 6. OVERTIME. Overtime shall be paid at the rate of time and one-half for all hours worked by any employee in excess of forty hours during any work week.

ARTICLE 7. SENIORITY. Section 1. Seniority shall be recognized by the Company based upon continuous service and ability to work and disposition toward performing the work to be performed.

Section 2. The Company agrees that when promotions, demotions, lay offs, or recalls to employment are to be made the following factors shall be considered, (1) knowledge, training, ability, skill, efficiency, and disposition to work, (2) length of continuous service from date of last employment (3) family status and number of dependents. Factor 1 shall control but when two or more employees have equal capacities under factor one, then factor 2 shall control. If two or more employees have the same status under factor 2, then factor 3 shall control and preference shall be given to the employee having the greatest number of dependents.

Section 3. Seniority shall be terminated and lost by an employee (a) quitting or resigning (b) being discharged (c) failure to report for work without notice to the company or without good excuse.

Section 4. An employee who shall suffer an injury or become ill, and whose claim of injury or ill health is supported by satisfactory evidence, shall be granted a reasonable sick leave of absence by the company without loss of seniority.

ARTICLE 8. GRIEVANCES. If an employee has any complaint concerning his working conditions, he shall within two (2) days from the happening of the event out of which the complaint arises, present a statement of his complaint in writing to the Superintendent. The superintendent will, within two (2) days, give the employee a written answer to the complaint. If any conferences or adjustments between the Company and the employee are required, a representative of the Union, on his own time, may be requested by the employee to assist him, and may be present at any adjustment or settlement of the complaint.

ARTICLE 9. HOLIDAYS. No employee except in the event of an emergency shall be required to work should he not desire to do so on any of the following recognized holidays: New Years Day, San Jacinto Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

ARTICLE 10. BULLETIN BOARD. The Union shall be entitled to have and maintain one bulletin board on the Company premises conspicuously located at a place designated by the Superintendent for the posting of notices of Union meetings, recreational and social affairs, appointment of stewards, and results of union elections; but no other notices or writings of any kind shall be posted on the Board without permission of the general manager or the plant superintendent

ARTICLE 11. RESPONSIBILITY OF MANAGEMENT. Nothing in this agreement contained shall be deemed to limit the Company in any way in the exercise of the usual functions of management. The Union recognizes that the company shall have the right and responsibility to determine the policy of management, the quantity and quality of the production to be produced, the material, and machines to be used and in general the operation of the company's plant, to hire, promote, discipline and discharge employees without discrimination against any employee because of his membership or non-membership in the union. All functions, powers or authority which the Company has not specifically abridged by this agreement are recognized by the Union as being retained by the Company. The Union recognizes that there are functions, powers and authorities belonging solely to the Company prominent among which, but by no means wholly inclusive, are the functions of introducing new or improved production methods or equipment, deciding the number and location of plants, the nature of equipment or machinery, the products to be manufactured, the methods and processes of manufacturing, the scheduling of production, the method of training employees, the designing and engineering of products and the control of raw materials; also to make or change such reasonable rules and regulations as it may deem necessary and proper for the conduct of its business, to eliminate, change or consolidate jobs, sections, departments or divisions, to operate one or more departments, jobs, sections or divisions while others are closed down, to control absolutely the volume of its production and the allocation of work to departments and jobs, to determine the amount of and the occasions of overtime work, if any, to control the number of employees required from time to time and permit personnel outside of the bargaining unit to perform tasks or jobs ordinarily performed by an employee within the unit for experimental purposes or when an employee within the unit is not available to do the work, all in addition to the rights and responsibilities of the company heretofore mentioned. A laid off employee qualified to do the work involved shall for the purpose of this paragraph of this contract be deemed to be available for work. The enumeration of certain functions herein shall not be deemed to exclude any other normal functions of management not enumerated in the paragraph as reserved to the Company.

ARTICLE 12. SEVERABILITY. Should any word, phrase, clause, sentence, period of time or paragraph contained in this agreement be held void, then the void portion shall be reduced to the minimum possible under the context and the remainder of the phrase, sentence or paragraph shall be binding on the parties according to its letter and spirit.

ARTICLE 13. EFFECTIVE DATE AND TERM. This agreement shall become effective upon approval of its terms by the Union, the majority of the employees and by the responsible officers of the Company. Immediately after such approval it shall be signed by the parties and shall continue in effect for a period of one year from the date of signing.

SIGNED AND DELIVERED IN TRIPLICATE ORIGINALS on the day and year first above written.

American Federation of Grain Millers
By________________________

Employees of Fant Milling Company
By________________________
____
____
____
____
Committee

Fant Milling Company
By________________________

GENERAL COUNSEL'S EXHIBIT No. 17

COPY

ARTICLE 5. WAGES. The Company shall have the right to increase the wages of any one or more or all of the employees at any time and agrees to pay during the term of this contract or until notice to the contrary is given in writing to the union and employees for a period of not less than two weeks, wages as set out below:

FLOUR MILL

Milling Department:	
Second Millers	$1.64 hr.
Bolters	1.51 hr.
Smutters	1.51 hr.
Oilers	1.41 hr.
Sweepers	1.36 hr.
Small Package — Packing Department:	
Small Packaging Lead Men	1.46 hr.
Casers and Truckers	1.36 hr.
Packaging Girls	1.26 hr.
Packing Department:	
Head Packer	1.53 hr.
Flour Packer	1.46 hr.
Mill Feed Packers	1.46 hr.
Utility Man	1.36 hr.

Mixing Department:

Mixer Operator	1.53 hr.
Asst. Mixer Operator	1.41 hr.

Car Loading Department:

Car Loading Lead men	1.49 hr.
Car Checkers	1.46 hr.
Truckers	1.36 hr.

FEED MILL

Operations Department:

Feed Mill Lead Man	1.52 hr.
Pellett Machine Operator	1.46 hr.
Batch Mixer Operator	1.41 hr.
Grain Handlers	1.41 hr.
Comb. Packer, Sewer, Trucker	1.39 hr.
Grinders	1.38 hr.
Oilers	1.36 hr.
Truckers	1.36 hr.
Sweepers	1.36 hr.

Car Loading Department:

Car Checkers	1.41 hr.
Truckers	1.36 hr.

Warehouse Department:

Trucker Lead Man	1.41 hr.
Truckers	1.36 hr.

OTHER DEPARTMENTS

Maintenance Department:

Electrician	1.78 hr.
Tinners	1.76 hr.
Mechanics Class I	1.76 hr.
Mechanics Class II	1.69 hr.
Mechanics Class III	1.64 hr.
Mechanics Class IV	1.53 hr.
Carpenter Class II	1.64 hr.
Electrician Helper — advanced	1.46 hr.
Mechanic Helper — advanced	1.46 hr.
Electrician Helper	1.41 hr.
Mechanic Helper	1.41 hr.

Elevator Department:

Elevator Operator	1.47 hr.
Grain Handlers	1.36 hr.

Bag Department:

Bag room Checker	1.49 hr.
Bag Labeler	1.41 hr.
Bag Handler	1.36 hr.
Bag Cleaner	1.36 hr.

Truck Delivery Department:

Truck Drivers	1.41 hr.
Truckers	1.36 hr.

Shift Differential:

Day Shift — above hourly rates
2nd Shift — above rates plus 5¢ hour
3rd Shift — above rates plus 8¢ hour

Temporary Employees:

New employees shall be considered as Temporary Employees the first 60 days of employment and shall receive as Temporary Employees 10¢ per hour less than the lowest hourly rate as their starting wage during this period.

GENERAL COUNSEL'S EXHIBIT No. 21

ARTICLE 5. WAGES.

Wages during the duration of the contract shall be paid as listed below, unless decreased after notice to the union of intention to decrease wages applicable to all or part of the listed jobs as herein provided. But it is expressly agreed that the company may at any time increase the base pay or wages of any employee because of extraordinary effort or achievement on his part. In the event that the company shall during the duration of this contract consider a reduction in the wage of any employee or the wages of all employees necessary or advisable, notice shall be given to the union of the contemplated reduction in wages for a period of not less than two weeks and the question of reduction shall be negotiated for a period of two days before any reduction is put into effect. Should the company place a reduction in effect without the consent of the union, then the union may at its option by the giving of notice in writing for two weeks to the general manager of the plant terminate this contract.

GENERAL COUNSEL'S EXHIBIT No. 26

Sept. 7, 1954

Gillespie And Gillespie
Attorneys At Law
210 Merchants and Planters Bank Building
Sherman, Texas

Dear Sir;

In keeping with our understanding reached in our last meeting on August 27th, relative to the Grievance and Arbitrations clause to be incorporated in the Labor Agreement covering Employees of the Fant Milling Company, we are herewith enclosing a copy of the Clause as redrafted by the Union.

As you will notice we have used the Company's proposed language in most all instances and have only deviated by substituting a very short and to the point Arbitration clause as a means of final appeal after the grievance has been reviewed by the President of the Company or his designated Appeal Agent.

We sincerely hope this revised Grievance and Arbitration Clause will meet with your approval and this issue will no longer be a lion in the path of our attempt to reach an amicable agreement.

Very Truly yours,

American Federation of Grain Millers
Roy O. Wellborn,
International Vice-Pres.

ROW/d
cc/O. B. Fisher
V. O. Hilley

GENERAL COUNSEL'S EXHIBIT No. 27

GRIEVANCES

Any employee having any complaint in connection with his work may at any time which will not interfere with his work or that of a fellow employee, present his complaint verbally to his immediate foreman alone and for himself or through his shop steward or in company with his shop steward, as he may elect. If a satisfactory adjustment is not reached by the employee and his immediate foreman, then the employee may for himself or through his shop steward or with his shop steward present his grievance in writing to the plant grievance committee within three days from the date it was presented to his immediate foreman and not thereafter. The plant grievance committee shall be composed of and constituted by the stewards in the plant selected by the union. The plant grievance committee upon receipt of a grievance in writing may within three days from the time his grievance is presented to the grievance committee in writing, and not thereafter, present such grievance to the employee's immediate foreman and attempt to reach a satisfactory adjustment or disposition thereof, if it so desires. It is not intended that any obligation shall rest upon the grievance committee to present to the foreman any complaint or grievance not considered to be meritorious. If a grievance is timely presented in writing by the committee to the immediate foreman of the complaining employee, the foreman shall within three days give to the committee and the employee his determination of the grievance in writing. If either the committee or the employee is not satisfied with the determination of the Grievance by the immediate foreman, the *the* committee or the employee may by writing setting forth in plain words the basis of complaint present such grievance to the superintendent. The superintendent shall fairly and fully consider the complaint or grievance taking such time for obtaining facts as deemed by him to be necessary, not to exceed ten days however, and then thereafter within three days make a fair and final determination of the grievance. His determination shall be given to the committee and the employee in writing, which decision shall be written in plain and understandable words, and shall be final and binding on all parties, unless either the committee or employee shall desire to appeal from such decision to the president of the company or an appeal agent designated by the president. The appeal may be taken by notice in writing to the president that the employee is dissatisfied with the disposition made of his grievance by the plant superintendent, with a copy of all writings connected with the grievance and the handling thereof attached to such notice. When such notice is received, the president shall fix a time and place for hearing the committee or employee or both on the grievance, such time to be within fifteen days from the date of receipt of notice by him. The president shall hear the appeal, and the committee and the employee upon such appeal when so presented to him, or shall designate an appeal agent to act in his place and stead. If the complaint or grievance relates to the employees work or to any alleged violation of this agreement and is not satisfactorily settled by the president of the company or by the presidents appeal agent who has been appointed by the president to act in his stead then the grievance or complaint may be referred to arbitration by either party to this agreement.

The parties agree to use the facilities of the American Arbitration Association for the purpose of obtaining an impartial arbitrator to hear the dispute between the parties. The cost of the arbitrator and any expenses incurred by him shall be borne equally the parties hereto. both parties agree that the decision of the arbitrator shall be final and binding on both the union and the company.

GENERAL COUNSEL'S EXHIBIT No. 28

COPY

Letterhead of
Law Offices
GILLESPIE & GILLESPIE
210 M. & P. Bank Building
Sherman, Texas

November 23, 1954

Mr. Roy O. Wellborn,
American Federation of Grain Millers
2421 N. W. 18th St.
Oklahoma City, Oklahoma

Dear Mr. Wellborn:

We have your letter of November 21st. requesting a copy of notice which was posted on the bulletin boards of Fant Milling Company in Sherman on November 19th. We enclose a copy of the notice which speaks for itself.

As indicated in this notice, the information which the Company had, with reference to the desire of the employees, came through verbal statements of the employees.

Yours truly,

GILLESPIE & GILLESPIE
BY: /s/ C. H. Gillespie, Jr.

chgj:vnc
cc: Fant Milling Company
cc: O. B. Fisher, Paris, Texas

COPY COPY

November 19, 1954

TO OUR EMPLOYEES:

For more than a year your Management attempted to negotiate a contract with the Grain Miller's Union in line with the election held in this plant in 1953.

It was impossible to reach an agreement with the Union which Management felt was fair to the Company and to its employees, and which would permit continued efficient operation of the Company for its stockholders and for its employees.

Management has lately learned through statements made by various employees, that the majority of its employees no longer desire to be represented by the Union in all matters concerned with working conditions at this plant.

Therefore, we have today notified the Union that henceforth Management will resume dealing directly with its own employees concerning wages and working conditions, and no longer recognizes the Union as the bargaining agent for its employees.

FANT MILLING COMPANY
(Signed) Jas. A. Fant
President

JAF:jj

RESPONDENT'S EXHIBIT No. 3

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF OF L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 5TH DAY OF SEPTEMBER, A.D., 1953

APPEARANCES:

FOR THE COMPANY:

C. H. Gillespie, Jr., Attorney
Sherman, Texas

Mr. V. I. Martin, Vice-President
Sherman, Texas

FOR THE UNION:

Roy Wellborn
William Morris
Cleo Estes
V. O. Hilley
Elmer Warren
J. E. Parker

* * * *

[2] MR. GILLESPIE:

Mr. Wellborn, we have asked Mr. Robinson to take down the conversations here tonight. We haven't made any arrangements with him about typing it up. If you would like to have a copy of it typed up, why, you can make your own arrangements with Mr. Robinson. He is the reporter for the Fifteenth District Court. We suggest that if you want to have it typed up and get the original, why, well and good, and then we would probably want a copy. If we have it typed up and get the original, you are perfectly welcome to a copy.

MR. WELLBORN:

Actually we don't care anything about having the conversation recorded. Is there any particular reason for it?

MR. GILLESPIE:

Yes. There is a reason for it. I've got a pretty poor memory, and I can't write fast enough to take it all down, and I would like to have it available. And if there is any question about what was said, we will have it, so we propose to have it taken, and we'll decide at a later time whether or not it is necessary to have it transcribed. But if you, or any of you all, want copies of it, why, we are not taking the position that he is our reporter and nobody else can have it.

MR. WELLBORN:

I understand and appreciate it. We sometimes use a reporter, but usually just to take down agreements, but just in general conversation [3] we don't.

MR. GILLESPIE:

Of course, I am used to working with reporters and I can't always remember exactly what I said or exactly what somebody else said, and if I try to take too detailed notes, then I miss what is being said, and for that reason, why, I do want to have it taken down.

MR. WELLBORN:

It makes it much easier where you've got somebody else taking down notes for you.

MR. MARTIN:

For you too.

MR. WELLBORN:

I can remember.

* * * *

[46] MR. GILLESPIE:

That gets that one straightened out, that paragraph read. Time and one-half [47] shall be paid for hours worked in excess of forty hours in any one work week, period. That is all right there. Paragraph 7. Daily overtime. We can't agree to any part of that at this time. You're going to have to do some selling before you can sell us that one. You want to start selling now or do you want to wait until later?

MR. WELLBORN:

Which do you think would be the easier?

MR. GILLESPIE:
I don't know.

MR. WELLBORN:
Well, actually, it doesn't mean too much unless you want to stagger your employees work week, which I don't believe your company wanted to do anyway.

MR. GILLESPIE:
We don't want to, but we may have to sometimes.

MR. WELLBORN:
Under what circumstances would it be necessary?

MR. GILLESPIE:
It might be that we would have to — now, this is my idea — I am just getting it out of my own mind. I haven't gotten it from down there at the mill, but we might run into circumstances where we might have to run two shifts for four days and shut down the rest of the week. By doing that we could give our people forty hours, by four ten hour days, and not have to cut back their work week.

[48] MR. WELLBORN:
Well, if you give them four ten hour days, couldn't you give them five eight hour days just as easy?

MR. GILLESPIE:
There might be a possibility of that, but we might have to run it around the clock those four days and put all people, bunch all people into that period. Of course, this doesn't apply right now. How many shifts are we running right now, two?

MR. WELLBORN:

Three.

MR. GILLESPIE:

Three now. Of course, as long as you're running three shifts that wouldn't apply, but somebody said something here about some night men coming in at 8:00 in the morning.

MR. MORRIS:

I was speaking of the feed mill.

MR. GILLESPIE:

That feed mill is a headache.

MR. WELLBORN:

Of course, the purpose of that particular paragraph is to prevent the company from working a man forty hours the first two or three days of the week and then laying him off, which companies have a habit of doing.

MR. GILLESPIE:

From that standpoint purely I think that you've got something. But there always comes times when the company gets in a bind and [49] they might be able to work a man forty hours in four days when they couldn't work him forty hours in five days. I would have to go back and check with some of the supervisory personnel to see what those circumstances would be.

MR. WELLBORN:

Well, I understand.

MR. GILLESPIE:
But it can happen.

MR. WELLBORN:
I understand from talking to some of the people down there at the plant that their superintendent or some of the supervisors have occasionally been in the habit of working a man forty hours the first, possibly the first three or four days of the week and then laying him off and then everybody else going ahead and working. Laying him off just because he had his forty hours in. That we seriously object to.

MR. GILLESPIE:
Unless there is a good reason for that, I can see the possibility where a maintenance man might need to work forty hours in two days to get the thing going so that everybody else can go to work. And they lay him off the rest of the week to catch up on his sleep.

MR. WELLBORN:
Do you think that is treating the maintenance man fairly?

MR. GILLESPIE:
Well, it would [50] be a little hard on the maintenance man, but if you had something broken down that was going to stop one-hundred fifty people from working, it would be a good idea to work that man through forty hours to get it ready so the rest of them can go to work.

MR. WELLBORN:
We have no objection and the maintenance men have no

objection to working forty hours if it is necessary to get the plant working, but he expects to get premium time for that.

* * * *

[52] MR. GILLESPIE:

Now, we got down to 8. That is a part of the pattern that we have been talking about. We can't agree to any part of Paragraph 8 at this time. We'll have to study the effects of that on the costs, the competition, and if some offsetting advantages are set up in here for the company later on, why, then we might agree to that.

MR. WELLBORN:

Actually that is [53] your policy at the present time.

MR. GILLESPIE:

No staggered work week. No, I don't think that is the present policy. It is something that should be avoided if possible, and I think our present policy will be to avoid a staggered work week if possible.

MR. WELLBORN:

The company isn't in the habit of operating swing shifts there to the effect where they work full crews on Saturdays straight time, are they?

MR. GILLESPIE:

I don't know of any operations of that type in the recent past.

MR. WELLBORN:

I don't think they do that, do they?

MR. GILLESPIE:

And the company doesn't intend to do that if it can avoid it, but just to sit down here now when we don't know what is going to happen in the economic setup and say we won't, I don't think we could do that.

MR. WELLBORN:

You wouldn't want to take unfair advantage of your competitors.

MR. GILLESPIE:

Any advantage we can take of our competitors we are going to take. We are not going to start sticking them up with a shotgun, but if we can do better than they can, we are going to do so.

[54] MR. WELLBORN:

I certainly don't blame you for taking any advantage you can, but we certainly don't want to be put in the position that we are partial to your company.

MR. GILLESPIE:

It looks like somebody is going to have to change their position on that one before we can get through with it, because, as I say, the mill doesn't have any intention of using staggered work weeks, unless it has to, but it wants to be in a position to do it if it does have to.

* * * *

[58] **MR. GILLESPIE:**
What rate is the mill paying for Sunday work now?

MR. WARREN:
Time and a half.

MR. WELLBORN:
You mean they are not paying double time now?

MR. WARREN:
No.

MR. WELLBORN:
I am surprised at that. Just a little bit.

MR. MARTIN:
Not much though.

MR. WELLBORN:
I really am.

MR. GILLESPIE:
How much Sunday work is actually done?

MR. WARREN:
Well, on maintenance we have some. Two weeks ago we worked Sunday and we work tomorrow. Worked twelve hours and a half Sunday before last.

MR. GILLESPIE:
The maintenance work is about all that is done on Sunday, isn't it?

MR. WARREN:
That is right.

[59] **MR. GILLESPIE:**
That is stuff that has to be done when the mill is shut down.

MR. WARREN:
That is right.

MR. GILLESPIE:
Well, there again I don't think that we can agree to pay double time for this kind of work.

* * * *

[62] **MR. WELLBORN:**
Right now, I want to make the agreement that they pay him double time or not make it compulsory that he does work.

MR. GILLESPIE:
We certainly don't want anything in the contract that makes it compulsory for him to work. In other words, he has got a present choice, he works or not. And I don't think anybody down there is going to be unfair about trying to work a man to death or killing him or anything, but

[63] **MR. WELLBORN:**
Let me phrase it this way then. If you call a maintenance man and he doesn't want to work on Sunday, then there is nothing to keep you from getting someone else to work, but there is a question in there whether you have a right

to fire him for refusing to work on Sunday or not. That is the question we'll want clear.

MR. GILLESPIE:

I don't think that we are ever going to sign any contract that doesn't give us the right to fire a man when he won't come to work when we need him.

MR. WELLBORN:

Is Sunday part of your regular schedule down there?

MR. GILLESPIE:

Sunday has got to be a part of our regular schedule for maintenance work apparently.

MR. WELLBORN:

Well, that is why we are asking that you pay him double time. If it is compulsory that he work on Sunday when the company needs him or wants him to work, then we think the individual man, employee is certainly entitled to be paid for it.

MR. GILLESPIE:

Apparently the company thought you were entitled to time and a half, because that was what you have been paid, isn't it?

MR. WARREN:

That is right. [64] Time and a half for over forty hours.

MR. GILLESPIE:

Have you been drawing time and a half on Sunday when you had not worked over forty hours?

MR. WARREN:

I always work over forty hours.

MR. GILLESPIE:

For the maintenance work, for the maintenance crew Sunday is part of it.

MR. WELLBORN:

Forty hours a week.

MR. GILLESPIE:

Say you work thirty hours during the week and ten hours on Sunday, you don't get the time and a half for your work on Sunday.

MR. WARREN:

No, time and a half only for overtime, over forty hours.

MR. WELLBORN:

Actually you don't get any premium.

MR. WARREN:

Saturday is straight time if not over forty hours.

MR. WELLBORN:

The only thing they are paying you is what the law demands.

MR. WARREN:

That is right.

MR. GILLESPIE:

Time and a half for overtime after forty hours.

MR. WARREN:
Yes.

[65] **MR. GILLESPIE:**
Actually that is all we are willing to pay at the present time.

* * * *

RESPONDENT'S EXHIBIT No. 4

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 26TH DAY OF SEPTEMBER. A.D., 1953

APPEARANCES:

FOR THE COMPANY:

Mr. C. H. Gillespie, Jr., Attorney
Sherman, Texas
Mr. Fred Honea
Mr. V. I. Martin
Mr. O. B. Fisher

FOR THE UNION:
Mr. Ralph Cox
Mr. W. M. Morris
Mr. Onnie Ray
Mr. J. E. Parker
Mr. Elmer Warren

* * * *

[5] MR. GILLESPIE: . . .

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[6] Paragraph 16, your callback [7] minimum, does that ever happen, an employee called back to the plant after he has left will be given four hours work and be paid for it at the applicable overtime or premium rate, or in lieu of being given that much work, shall be given pay equivalent to the amount he would have received had he worked four hours. Do you ever get called back at the plant after finishing a shift?

MR. WARREN:
Some of them.

MR. GILLESPIE:
You are probably one of them that do.

MR. WARREN:
No. I never have been called back.

MR. GILLESPIE:
That is in the milling department that they get called back.

MR. WARREN:
That is in the maintenance. I wouldn't know about the other. Electricians and machinists and what not.

MR. PARKER:
We have a few times been called back, we would have a load out and be called back. Not very often.

MR. GILLESPIE:
But whenever you are called back, why, you've got four hours of work or more to do down there?

MR. PARKER:
Yes.

MR. GILLESPIE:
And of course, [8] if that runs into overtime you get paid the overtime. Now, there again we are pyramiding this overtime in that section and it runs contrary to the policy that we will pay overtime for hours over forty. In other words, if you are called back, or if you report and work two hours, and that makes more than forty hours, sure you get overtime. But overtime for being called back, we can't agree to now, and I don't know of any change that would be indicated that we would change our position on that.

Paragraph 17, for early call in, "An employee called to work two hours, or less, prior to the established starting time of his scheduled shift shall be paid only for the time worked on the early call in and at the overtime or premium rate applicable to such hours."

How often does a man get called in ahead of his shift?

MR. PARKER:
Well, we do quite often.

MR. GILLESPIE:
Well, it is the normal thing for you, you don't really have a normal shift hour, do you?

MR. PARKER:
No, sir.

MR. GILLESPIE:
In other words, if a load has got to be in, say, Houston by night, you've got to leave fairly early to get there.

[9] MR. PARKER:
Yes, sir.

MR. GILLESPIE:
Maybe you have to go further than that where you have to leave early, but that won't be a normal shift. In other words, on the truck — in the trucking department, why, you work odd shifts.

MR. PARKER:
Yes, sir.

MR. GILLESPIE:
Shift around all time.

MR. WARREN:
In maintenance they might be called in an hour early on Monday morning occasionally.

MR. GILLESPIE:
When you go in an hour early on Monday morning do you get off an hour early on Monday afternoon?

MR. WARREN:
No

MR. GILLESPIE:
But work right on through?

MR. WARREN:
Yes.

MR. GILLESPIE:
But you do get credit for this extra hour as overtime at the end of the week if you have drawn you —

MR. WARREN:
Forty hours.

MR. GILLESPIE:
Forty hours. I don't believe that the mill will be a position to agree to any premium pay except for overtime actually worked and [10] that pretty well applies from paragraphs, oh, — well, it will just about apply from paragraph 5 on through 17. Now then, this paragraph 18, jury pay. We

object to that. Jury service is an obligation and a privilege of a citizen in a free country. The fact that we have juries, you can't be locked up without having a jury pass on it is one of your privileges. And the privilege, of course, carries the right with it to go sit on the jury when necessary, and that is not an obligation or a function of the mill.

(A man comes into the hearing room at this time, but the reporter does not know who he is.)

MR. GILLESPIE:

In other words, if we agree to pay the difference between what the jury pay was and what the man's normal work during that day would be, we would just be subsidizing the State of Texas or the Federal Government and they have been in the subsidizing business themselves lately. We might as well let them keep on. If you all think the jury pay is not high enough, the Legislature is the place to talk to about that. But really we don't feel like this is a part of the mill's obligation. That is one of the things that everybody has to take their time on. I am called for jury service occasionally. Nobody ever takes me on the jury. I don't know whether they don't like my looks or what the deal is, but when I get called I have to go down there and doesn't anybody pay me for it either. How [11] often are you all actually called on jury service?

MR. RAY:

I was called once about two years ago, maybe a little better than two years ago.

MR. WARREN:

I have been called twice in the last six years. They called up and got me off both times.

MR. GILLESPIE:

Well, really we haven't got too serious a point there in that jury pay. Another thing on that jury deal, it would be unfair to your women employees for men to go on up on the jury service and get full pay when the women are not eligible and don't get to go.

MR. WARREN:

I think most of them would rather be on their regular job than be up there anyway.

MR. GILLESPIE:

I expect they do. I expect all of you would. But I imagine you would find some of the ladies down there that would like to go up there and sit around that jury room and see what goes on. That is not too material a feature anyway. But the real objection to that is that is one of the obligations of a citizen of the State and of the country. And it hits everybody about alike, so the mill won't agree to that. . . .

[16] MR. GILLESPIE:

Of course, applicable to all of this seniority stuff, the policy of the mill, as I understand it, is to put the man that can do the job best in that job. If a man has been working five years and is capable of doing a job higher up, then certainly he should go on that job in preference to a man that had been working one or two years. If you get a man in there that is naturally inclined for a particular job, and after he has been there one or two years he can do it better than a man that has been there five years, the mill is interested in putting that man that can do that job best in that job. Now, I say the mill is interested. All of you folks is interested in it the same way. The mill is made up of the working force and the management. The whole thing is the mill. And anything that improves the production, or the earning capacity of the mill helps the folks that you represent, Mr. Cox, as well as the folks that I represent. And we're going to have to have this worked out in some way so that ability can be recognized. I don't think that the mill is going to agree [17] on just straight seniority. I know you have in here, if that is what you're looking for, you have a provision in here that the man—, "Promotions shall be made upon the basis of department seniority first, and then plant seniority, providing that the employee's ability and physical qualifications are sufficient to permit him to perform the duties."

I think we're going to want to clarify that quite a bit more, because just a straight out and out seniority deal, I don't think is workable. And to get something in a contract that will permit ability to be recognized and passed on without getting into arguments over it is going to be a job to get it worked out I think.

MR. COX:

Well, how are you going to clarify it any more then? When you say ability and physical qualifications you cover a multitude of sins there.

MR. GILLESPIE:

Well, you do cover a multitude of sins there, but who is going to determine that ability and physical qualifications?

MR. COX:

It is usually worked out through your plant management and your union committee.

MR. GILLESPIE:

Well now, the plant management, of course, works those thing out now, determining ability, and I don't think that we are going to agree to anything that is going to take away that management prerogative of promoting the people that are in their opinion [18] the best able to do the job. Now, your plant seniority and department seniority tie in there with Paragraph 19.

MR. COX:

Well, the whole thing ties in together.

MR. GILLESPIE:

Well, it is all pretty well tied together. We don't have too many different departments there in the mill, do we? We have the milling and the feed and the trucking. Isn't that about all the departments, or do you have more, Mr. Honea?

MR. HONEA:

Well, we have flour milling and packaging and feed.

MR. GILLESPIE:

Are they broken down into separate departments?

MR. HONEA:

Yes, and we have in addition to that our elevator department which handles grain. That is a different department.

MR. GILLESPIE:

Well, if we work out something on this continuous service part, I don't think it will be too hard to actually set up which departments in your plant and department seniority, but whatever we work out on that, we're going to have to have the question of ability worked in there, and I think that the choice of which man goes into which job is primarily a function of management. Now, just how far we'll go toward consulting or working on that I don't know yet. But the final say on that question, [19] I think, is going to have to remain with the management of the mill.

MR. COX:

Mr. Gillespie, when you get into seniority, I realize it is a big question, but that is a subject, it is something very dear to all of your employees and they like for seniority to be recognized. That is one of the big functions of organized labor. We have always been able to work it out. We have never run into much trouble in regard to promotions in any of our plants, and we have never found where the union has wanted to put a man on the job if they was quite sure in their opinion he didn't have the ability. How would you reword that, if you've got something in mind, we would be glad to take a look at it. But how are you going to reword that physical ability and qualifications?

MR. GILLESPIE:

Later on we'll have to get our ideas together and put them in the form of a proposal, but what I am trying to do now is to see just what the effect of this is, so that we can formulate our ideas on what ought to be in there. . . .

* * * *

[45] MR. COX:

Well, I think what you want, you want the company to be the sole judge and jury and promote who they please and when they please, and that is one thing that we're going to hang onto. That is what these people want, is protection in seniority rights and we want to see that they get it.

MR. GILLESPIE:

In other words, if the company insists on the right to hire and fire and promote, according to its judgment, why, then you just won't have any part of it?

MR. COX:

Well, we'll work something out with you.

MR. GILLESPIE:

That is what we figure on, is working something out. But there are certain of those things that the company is going to have to insist on. And we don't want to get tied up by contract so that we won't be able to promote and demote and hire and fire as we think necessary. Now, there are certain policies and things that might be set up that will be workable and I don't know of anybody connected with the company that wants to be unfair to any person. But now there is quite frequently room for difference of opinion as to what is fair and what is [46] unfair.

MR. COX:

Well, let me say this, we have always been able to work out a seniority provision that will work for the company and for the union.

MR. GILLESPIE:

We would like to have some help in doing it. Now, we can set up one that we think will work, but you, of course, have had much more experience with those things than I have had. And I think probably you know more about it and can set it up better than I can . . . .

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RESPONDENT'S EXHIBIT No. 5

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 12TH OF NOVEMBER, A.D., 1953.

APPERANCES:

FOR THE COMPANY:

C. H. Gillespie, Jr.
V. I. Martin
O. B. Fisher

FOR THE UNION:
Ralph Cox
Onnie Ray
Cleo Estes
W. M. Morris
Elmer Warren

* * * *

[4] MR. COX:

Ready to start at Paragraph 31.

MR. GILLESPIE:

That is about where I thought we were to, on the vacations. I don't know that the company will be willing to make any prescribed permanent vacation policy in the contract. We don't know what we're going to have from time to time, and the position of the company is that the company would like to carry out at least its present vacation plan, but that we can't make a definite contract to do that at this time. So we don't know what our situation is going to be from time to time.

MR. FISHER:

When is the vacation now?

MR. GILLESPIE:

The vacation now, if I understand it right, is one week at Christmastime.

MR. MARTIN:

Really I can't answer that.

MR. GILLESPIE:

You weren't down there last Christmas. Mrs. Estes will know more about that.

[5] **MR. WARREN:**

We had five holidays.

MR. GILLESPIE:

This included Christmas Day.

MR. WARREN:

Yes. Thanksgiving, New Year's and Christmas.

MR. GILLESPIE:

No, vacation we are talking about.

MR. WARREN:

We didn't get any Christmas vacation other than Christmas Day.

MR. GILLESPIE:

Hasn't there been a vacation period of one week before?

MRS. ESTES:

Yes. Anytime you want to take it you can, one week.

MR. GILLESPIE:

I got that confused with another plant that shuts the plant down one week for Christmas and lets it go.

MRS. ESTES:

Just one day on Christmas.

MR. GILLESPIE:

But the present policy, and it has been in effect for some years that you could have one week at your choice.

MRS. ESTES:

Yes.

* * * *

[7] **MR. FISHER:**

I think it could be and also 35 is all right. 35 appears to be all right as Mr. Cox has written it.

MR. GILLESPIE:

Well, yeah, the way Mr. Cox has got 35 written is just about the policy that has been followed on vacations before. "Vacations will be granted at such times of the year as the company finds most suitable, considering both the wishes of the employees and the requirements of plant operation."

And 36 and 37 I don't think are too objectionable from the standpoint of the company. 37 certainly wouldn't be objectionable. I think 36 could be worked out if it wasn't anticipated too much and of course, [8] that, when it is for the mutual convenience of the employee and the company means that it couldn't be anticipated too much.

MR. FISHER:

I am a little surprised that Cox wants 37.

MR. COX:

You shouldn't be.

MR. FISHER:
Also 38.

MR. GILLESPIE:
37 is vacations cannot be postponed and allowed to accumulate from year to year. That, I think is a wise provision. 38, "Employees cannot waive their vacations and draw double pay by working during the time allowed."

I don't know. There might be times in a rush period when the company might want to do that if the employee was willing. I think year in and year out it would be better for them not to waive it. Go on and take their vacation and get away from the mill for a week, and they would feel more like working when they get back.

MR. FISHER:
I am surprised they would want a contract waiving the right, if the company would agree to and pay them for working.

* * * *

[12] MR. GILLESPIE:
I don't think that is a point that we would lock heads over if everything else in connection with the vacation were worked out and agreed on, why, we could probably work out something on 39 without too much trouble. The basic objection to the whole vacation setup in the contract is that is one of those things that we would rather not make a definite contract on for the future. We would rather work it out from year to year as it comes up. Now, you get down to one that we probably will have some difficulties

over before it is over with. And that is this grievance procedure. We definitely will have to have a grievance procedure, and there is one thing that the company will probaby insist on, and that is that the executive officers of the company have the right to exercise final authority. That doesn't mean that there won't be a procedure where stuff can be negotiated and worked out, but we're not willing now certainly to set up something where we'll have outside people coming in to work out these grievances. I don't think that there will be an grievances that can't be set down and worked out among the union representatives and the company representatives. Now, we [13] would like to have a simple straightforward grievance procedure that nine times out of ten can be worked out without it getting any higher than the mill superintendent. I think that if something gets to the point where the mill superintendent can't work it out with the employee and the committee that it should be taken on up to the executive officers of the company. But I think that most of the time it could be worked out right there in the mill between the superintendent and the employee and the representatives of the union. Now, there is another feature there, we would like for the employees to have the right to work out their own, or to call on the union representatives at the employee's election. In other words, the company will be glad to deal with the union representatives and the employees at any time, but we think that, as I read the law it gives the employee, the individual employee the right to take up his own, or the right to have representation, and we would like to follow the law on that feature of it.

* * * *

[16] **MR. GILLESPIE:**

Yes, the company representatives. I'm sorry, I didn't see the "s" on there. Then you get down to the fourth step, "It may be referred to the International Union and company executives for settlement."

Now, that is the point where we would expect the company executives to have the final yes or no say. Now, there would be no objection to a full discussion of it with the International Union, whoever you would want it to be discussed with. But we think the final settlement of it there ought to be left to the executives. That of course gives you our objections to paragraphs 42 and 43, and 44 is not particularly objectionable. But we don't think with amicable relations between the company and the union that that arbitration is necessary. And we would rather leave it that we sit down there just in the family and work the thing out.

MR. COX:

Nine times out of ten we can. If you are going to object to it, some of us sit in there and work on it. I think once you get into this procedure you'll find out how sweet it works and nine times out of ten you can solve your problems.

MR. GILLESPIE:

There is not as much difference between the grievance procedure we have [17] set up and the suggested grievance procedure you have set up as I thought there was. The way we have it set up in our proposal, the employee could go on through on his own if he wanted to, and you let him go through the first step and then the union takes over without him. Of course, your arbitration clause is in another paragraph. It is really a part of the grievance procedure. What is your thought on that, Mr. Fisher?

MR. COX:

As so stated in there, the grievance procedure is a standard grievance procedure carried on through which is right in harmony with the law.

MR. GILLESPIE:

As I remember the law, it permits arbitration but doesn't require it. Am I right on that, Mr. Fisher?

MR. FISHER:

I don't think it is required. The fact of the business, many courts have frowned on arbitration as being against public policy, depending on the extent to which it is contracted.

MR. GILLESPIE:

Texas has a pretty long-winded detailed arbitration statute that we might, if we contract for arbitration, we might have to comply with it. You want to take a good look at that statute before you get in the position of having to go through with it.

MR. COX:

We are not bothered about this as far as our part, because we have them in all our contracts in Texas. In other words, we go through the grievance procedure and we come in on it with the company and the union and still we can't agree, you've got to have somebody to resolve it and when the arbitrator makes his ruling it is final and binding on all parties.

MR. GILLESPIE:

I think as you say nine out of ten of them wouldn't even get up to the fourth step, but I don't know that management is going to be willing to let that final step go beyond the executives of the mill.

* * * *

[35] MR. GILLESPIE:

In this Paragraph 52, "Neither party will make changes in the terms and conditions of employment as set forth in this agreement during its life. However, this agreement may be amended or revised in any of its provisions at any time during its existance, provided such amendments or revisions are approved in writing and [36] subscribed to by all parties to this agreement."

I don't see any objection to it unless it makes the contract too long. It is implied in all contracts.

MR. FISHER:

If it wasn't in there, it would be just the same contract in effect without it.

MR. GILLESPIE:

I take it from the fact that you left your department classifications and rates of pay blank, that you are pretty well satisfied with those as they are. Going to let us write them in on the present practice?

MR. COX:

No, I presume when Mr. Wellborn drew this up, he only drew up a contract. We don't know what your classifications and rates are. We'll have to study those.

MR. FISHER:
We will furnish you some classifications.

MR. GILLESPIE:
I think we have furnished them to you.

MR. FISHER:
Don't you have them?

MR. GILLESPIE:
I think they furnished them to Mr. Wellborn and didn't furnish them to me. Is that what you all did?

MR. FISHER:
I don't have the classifications.

[37] MR. GILLESPIE:
I don't have them.

MR. FISHER:
We would have to get them ourselves before we could furnish them.

MR. GILLESPIE:
They gave Mr. Wellborn them before I got into this.

MR. FISHER:
Is that right?

MR. COX:

I presume that is what this is. It is a bunch of figures.

MR. MORRIS:

I presume that that is what you gave him down there.

MR. MARTIN:

I drew up a list right after I first came with the company.

MR. FISHER:

Well, we'll furnish you with a list of the jobs down there, and I think the employees know what the classifications are.

MR. COX:

By the same token you must have every job classified.

MR. FISHER:

Yes. But I don't think you ought to have the same kind of work classified as ten different classifications.

* * * *

RESPONDENT'S EXHIBIT No. 6

[1] FANT MILLING COMPANY
UNION NEGOTIATIONS,
SHERMAN, TEXAS, ROOM 210
M. & P. BANK BUILDING
DECEMBER 9, 1953, 10 P.M.

APPEARANCES:

FOR MANAGEMENT:
V. I. MARTIN, Fred HONEA, C. H. GILLESPIE, JR., and O. B. FISHER.

FOR THE UNION:
Mr. Ralph COX, For the International

COMMITTEE:
Messrs. W. M. MORRIS, Onnie RAY, J. E. PARKER, Tommie MORRIS (Sitting in for Mr. V. O. HILLEY), and Elmer WARREN.

* * * *

[13] MR. GILLESPIE:
In that Article II,

> "And there shall be no discrimination, restraint, or coercion of any character by the Company, its agents, or representatives, or the Union, its representatives or members, against any employee because of his membership or non-membership in the Union."

[14] You certainly don't favor any discrimination by the Company, if no discrimination by the Company there ought not to be any discrimination by the union on it.

MR. COX:

I think we should work out a clause on that. We will not have too many objections on that.

MR. FISHER:

May we mark that O.K., then, Article II, or put it O.K. with a question mark? Of course, talking about O.K. as far as you are concerned.

MR. COX:

State it this way, "Not too much objection to a clause of that type".

MR. GILLESPIE:

Article III, The Purpose Clause, we have set that out the purpose of the whole contract is to work in harmony for the mutual advantage of the employees and the Company, and to carry that purpose out we have set out there a no-strike, no-lockout clause. What is your objection to that article?

MR. COX:

I like the language in our paragraph "Purpose" much better. It has really got it spelled out, what is expected by both parties. I think it is good business for the employees to read such as that. It tells not only what is expected by the Company but what is expected by the employees.

MR. GILLESPIE:

Will you really get down to that, that is to work in harmony for the mutual advantage?

[15] All we have done is add to that some provisions to assure working in harmony for mutual advantage, because we put a provision in there, if the Company locks out the man, for every day the man is locked out he gets 1/250th of his compensation for the preceding twelve months, figuring about 250 working days a year. We say we won't lock you out. That is a specific penalty to pay for, and having set that penalty up against the Company, we turn around and set the same thing up against the union, if there is a strike.

MR. COX:

From Article III on down we could not agree to it at all.

MR. GILLESPIE:

Do you mean by that, Mr. COX, the answer to it from III on down is a flat "No", and you don't want to talk about it?

MR. COX:

I am willing to talk about anything you have got to discuss.

MR. GILLESPIE:

Well, of course, just talking about it is one thing, but I mean by talking about it, discussing it with the idea of working out the disagreements on it, and working out a contract.

MR. COX:

Well, I will state this: We have no objection to working out a no-strike clause if that seems to be necessary. In other words, we would not let that stand in the way of an agreement. We [16] certainly don't like the language there on down. This 1/250ths and 1/250ths, I don't like that, never saw it in a contract before.

MR. GILLESPIE:

There are contracts that have responsibility and penalty provisions for strikes and lock-outs. This is not exactly like any of the others I have seen, but that is a perfectly lawful subject for an agreement, and if you are going to have a contract saying you won't do this, or won't do that, it looks to be like sense to put in a provision to include it and provide penalties if you do violate it, probably take out that 1/250ths and put in specific amounts if that is the thing you object to, but it applies differently and the fraction makes it work the same way for everybody. If we say Ten Dollars a day, or Five Dollars a day, or something like that, then it does not apply equally, but if you go back and take a man's total wages twelve months preceding, divide that by 250, which is the approximate number of working days a year, then pay him that amount every day he is locked out, it fits everybody up and down the whole scale in the mill according to their earnings during that previous year.

MR. COX:

Your meaning of that would be during the life of the agreement, is that right?

[17] MR. GILLESPIE:

I don't think we can extend it beyond the life of the agreement, can we. It does say there so long as you are the qualified acting bargaining agent for the employees.

* * * *

[19] MR. COX:

I just mentioned those two combined. Let me ask you what Article V is. Is it your thinking to leave job classification, and wages out of the contract, simply go by that paragraph?

MR. GILLESPIE:

Yes, in other words, we will not reduce wages during the life of the contract but shall have the right to increase wages of any one or more employees or all at the same time. In other words, we maintain the present fixed scale. We can't reduce it, but we do reserve the right to raise wages wherever it is indicated, that they need to be raised.

MR. COX:

Even employees in the bargaining unit?

MR. GILLESPIE:

Uh huh.

MR. COX:

We could not agree on a set up like that.

[20] MR. GILLESPIE:

In other words, you want to prohibit us from raising wages?

MR. COX:
It is a bargaining issue.

MR. GILLESPIE:
I should think you would be willing to take a raise on them at any time.

MR. COX:
But you don't have in mind raising them all. If you want to pick out a man, think he is entitled to a little compensation, working side by side by somebody else, you want to raise him and let the man beside him not get a raise.

MR. GILLESPIE:
That is because he is doing more work in less time or a better job. Back in the contract we said there would be no discrimination. If we raised one and did not raise another, working side by side, that would be a discrimination. Certainly, we have no intention of discriminating against anyone or any group of employees. We thought when we put it in there we could not cut but could raise that would certainly be acceptable.

MR. COX:
It is a bargaining issue. I could not agree to a paragraph like that at all.

MR. GILLESPIE:
Then, your position on that is, you won't under any circumstances agree to raising any employee's wage, without separate bargaining on it?

MR. COX:

What do you mean 'separate bargaining'?

MR. GILLESPIE:

In other words, if he deserves it in a [21] bargaining issue. We agree with you. We say we will not cut it during the life of this contract but we want to have the right to raise it, and you want us to bargain separately on each raise before we can raise any one or more of the men's pay or the women (we say "Men" — there are women too). In the contract we said "employees', we did not say "men" or "women".

MR. FISHER:

I think it is highly desirable for the Company to have the right to increase wages because it is an incentive to the employee to do better work.

MR. COX:

Well, we would certainly insist on having the classifications and everything spelled out, and rates of pay. Then there can be no misunderstanding about it.

MR. GILLESPIE:

If we would put classifications and attach it as "EXHIBIT A" and you approve Article V with that added to it. I am surprised at that, when we tie their hands and could not cut wages but reserved the right to raise them, we thought you would be glad to get a raise that was coming.

MR. COX:

Mr. Martin, did you ever see a contract signed where there was a clause put in there they could raise them at any time they wanted to?

MR. MARTIN:

I never have seen but one contract signed any one company.

[22] **MR. COX:**

You knew pretty well how we deal, don't you? You have never had any trouble with us, have you?

MR. MARTIN:

No.

MR. GILLESPIE:

Have you ever turned down a raise for anybody?

MR. COX:

We have turned down a raise. The only experience I have had was when it went through negotiations where we settled it, we certainly never turned them down.

MR. MARTIN:

They sure raised Hell with me one time before I followed out my agreement raising them before I negotiated.

MR. GILLESPIE:

I can see where you would want to negotiate at least on cuts, but it looks like raises would be for the employees' benefit, looks like there would be no objection to that, objection to those when it could be done in the policy of the management. Of course, there have been quite a few raises cver a period of years, the cost of things have gone up and wages have gone up with them. We think it would be material for the mill to have the right to raise wages whenever it could. I hope that there will never come a time when they start cutting back but during the life of this agreement under that clause we can't cut back even if times warranted it unless you specifically agreed to those cuts.

[23] MR. COX:

You say you hope the time will come when it does come back?

MR. GILLESPIE:

I said I hoped the time would not come back when it was necessary.

MR. COX:

I misunderstand you.

MR. GILLESPIE:

If you don't run a mill or any other business solely for the purpose of paying wages by adequate and good wages is one of the primary ways of running a good business. We certainly don't want to be restricted against wage raises, we would like the right if in the Company judgment when it is necessary to cut them, not that they want to cut them, there might come a time during the life of the agreement.it is necessary to cut them. But to get something acceptable, we have cut that out. We have got to come and talk to you before we cut them.

MR. COX:

That is our position on it, Mr. GILLESPIE.

MR. GILLESPIE:

We will just mark that one "NO".

MR. FISHER:

Why not take that piece meal since it is "No" as a whole and see if he can agree on the first clause.

MR. COX:

There is only one clause there.

MR. FISHER:

There is two.

MR. COX:

No. There are two. That they will pay the wages for a year. The next one is that they may, that is, the Company [24] may, raise the wages.

MR. COX:

Once your classification is put in the contract this wage classification is set out in the contract, that ties it down where there won't be any decrease.

MR. FISHER:

With the present classification set out and the present wages, would that be acceptable? The Company is still going to argue with you about the right to raise them. I don't mean to back away from that, except —

MR. COX:

I think we can work out wages and classifications once we get a contract pretty well drafted up we can agree to it.

MR. GILLESPIE:

That is a very material feature. We are going to have to work out something on that, wages business, certainly. We don't want a detailed classification set out, in fact, we started into detailed classifications. You all got a big kick out of my idea of what a "smutter" was last time. (Mr. COX laughed) Would that be acceptable with the present classification and wages detailed added as an amendment?

MR. COX:

Well, I will answer you again as I did, Mr. GILLESPIE, once we get a contract negotiated I don't think he will run into difficulties and classifications.

[25] MR. GILLESPIE:

Sometimes it is easier to get these things we will not run into difficulty on worked out first. Then we would like to have an answer on that wage feature of that thing excluding the right to — we want to have the right to raise them. We are not waiving that feature, not talking about the first part. We are probably going to insist upon that right to raise them on that.

MR. COX:

We are going to have to do a lot more thinking on that.

MR. FISHER:

Mr. GILLESPIE, I don't know whether I understand COX or not. I believe I do.

MR. COX:

What do you say about setting down classifications and wages? Now, if we set out the classifications and the wages they are being paid now, and propose to pay those wages for the life of the contract, that is one year, would that be acceptable, set out the classifications for instance, Mr. MORRIS, whatever he is, whatever his job, is set out opposite his present pay per hour now?

MR. COX:
No. I don't think we are ready to get into that feature. There might be some intention of adjustments. We have not mentioned whether we have an increase in wages in mind. I would not sit here tonight —

MR. FISHER:
I am trying to get you to say yes or no.

[26] MR. COX:
I think I made my position clear.

MR. FISHER:
It was not completely clear to me. You said we would not have trouble about it, what I thought you meant. You would not agree to any — we suggest you would agree to wages remaining at what they are for the period of the contract. I was just asking that to find out where we were on the subject. I did not know whether I understand you or not.

MR. COX:
I have stated already. I will state it again, whenever we can get a contract drafted, the Union, where other issues

are settled, we are willing to sit down and discuss classifications and wages and see where we are at.

* * * *

[27] ARTICLE 6

MR. COX:

We are ready to go to Article 6. We did discuss Article 6 briefly with "four" there.

MR. FISHER:

"Six" is the overtime. We just followed the statute on that, what the law says. I understood from discussing "four" you don't approve of that?

MR. COX:

Well, certainly that is a bad clause, but like I stated, we are insisting on time and a half after eight hours in any one day, which that isn't written in there.

MR. GILLESPIE:

Well, are you prepared now just to finally disapprove of that Article 6 as we have got it?

MR. COX:

We could go along with it as far as it goes, but it does not go far enough.

MR. GILLESPIE:

That is all we are going to get about Article 6 [28] then? What about Article 7.

ARTICLE 7

MR. COX:

Well, your Article 7 does not give the employees any protection on seniority, and promotions, layoffs. In other words, this article as written leaves the sole discretion up to the Company, and I think in one of our previous meetings we dealt quite lengthy on that. That is one of the main points of organized labor, they have seniority protections, for promotions or lay-offs. We certainly could not agree to that seniority as you have it set up.

MR. GILLESPIE:

As I recall, those other discussions on seniority (if I am wrong on this, correct me) you did agree that the ability to do the job did enter into it, that was a factor on promotions.

MR. COX:

I think it is written right in our seniority clause.

MR. GILLESPIE:

And the other factors there is length of time — we have three factors: knowledge, training, ability and disposition to work. The second factor, length of continuous service from date of last employment, and the third factor is family status and number of dependents. I think we had tentatively agreed that the knowledge, training, skill, and so forth, should enter into it, and, of course, the length of continuous service from [29] date of last employment, that certainly is your seniority, and then your family status and number of dependents, — is that what you object to in that set up?

MR. COX:

I would certainly object to that one item.

MR. FISHER:

In other words, you don't want family dependents to be considered when there is a lay-off?

MR. COX:

We never have.

MR. GILLESPIE:

In other words, when that employee goes to work for that Company, a proven employee, he has a right to seniority protection on lay off regardless of status.

If you're going to lay off or going to promote you can look at the knowledge, training and ability to do the job, skill and efficiency. Then if you have got two employees, both have the same skill and ability to do the job, the next you look to is seniority, the man longest there gets it. If both skill and seniority is the same, then the man with the most dependents gets the promotion. We don't get to family status until you pass the other two elements. I don't see why that should be objectionable.

MR. COX:

Yes, but you are spelling out in considering if you have two men doing the same job and if you have got one, (it is in every plant) maybe one [30] can do it better, yet the other man getting the job done, satisfying the Company, you would want to pick the man who could do it better?

MR. GILLESPIE:

That is correct. We want the man who does the job better to get recognized for getting the job. That is the basis of discussion on the seniority thing. We recognize seniority in principle, but we cannot go along on seniority and not have skill and ability on it. I think you agreed with us skill and ability needed to go in that.

MR. COX:

We have that set out in our proposal, yet it is not spelled out. That man does not get his opportunity.

MR. GILLESPIE:

If he has skill and ability he will get his opportunity.

MR. COX:

On your proposal you are going to pick him strictly on his ability, that is a different factor, but seniority is also number one item.

MR. GILLESPIE:

We are going to pick him first on skill and ability, then and that being equal, let seniority control. If you let seniority control alone, then the guy that has been the longest is going to be the head miller. That does not always work.

MR. FISHER:

You mean seniority, by seniority, GILLESPIE, you are using the length of service.

MR. GILLESPIE:

Yes, length of service. If length of service [31] alone controls it, it won't work.

MR. COX:

All right, Let me ask you this: What do you find wrong with our seniority set up?

MR. GILLESPIE:

That it does not recognize training and ability to do the job, that we think is very important. We have got all yours and given you at some length our objections to it, and we have turned around and written our counter-proposal on there, that does not set up that knowledge and training and still recognizes seniority as straight length of service as controlling factor where skill and ability are the same. I don't think you want the job, promotions, or lay-offs, to be made exclusively on length of service. That was not my understanding from the discussions we have had.

MR. COX:

Our idea is this: If a man has potential qualifications, or if promotions, he must be given a fair trial if he has the seniority.

* * * *

[55] MR. COX:

"The Union shall be entitled to have and maintain bulletin boards by each of the time clocks on the Company premises for the posting of notices of Union meetings, recreational and social affairs, appointment of stewards, * * "

Do you think you will need posting of stewards?

MR. FISHER:

The night you can't get the members out to meetings?

MR. COX:
I always get my members out.

MR. FISHER:
I bet you don't.

MR. GILLESPIE:
You struck out "place designated by the Superintendent". If you leave that out and pick up "for the posting of notices of Union Meetings, recreational and social affairs, appointment of stewards, and results of Union elections," does it sound all right to you? You have cut out, "no other notices or writings of any kind shall be posted on the board without permission of the General Manager or the Plant Superintendent."

MR. COX:
No, I don't want anybody sticking up any kind of note.

[56] MR. GILLESPIE:
Shall we agree on what he has rewritten on our paragraph?

MR. COX:
Come back, MARTIN, we have agreed on one.

MR. MARTIN:
You did? Good.

* * * *

[62] MR. FISHER:

Here is what I find, speaking individually, I am opposed to the arbitration, but just because I feel it does not work, does not serve any good purpose, but I know that arbitration in labor contracts has become a common thing. Now, under what you propose you get these two men set up, —

MR. COX:

Two company and two others.

MR. FISHER:

Two company, two others, then you provide if they disagree then they name a fifth man. Now, just because I live in a stock law country where they have got a stock law against folk letting their stock run out, I have not in recent years had occasion to deal with a lot of arbitration with reference to corn which a cow ate up. I dealt with them that way. These three men don't agree on it. They agree on a fifth one, and they never agree. That is the end of it. Two of them won't name one, these other two, they say "No". He don't suit me." And they — I mean, that is the end of it, you are stymied.

MR. COX:

We handle that differently. I can cite one occasion in Texas of that arbitration case we have had in Texas.

[63] MR. FISHER:

After they get hitched they will not agree on the fifth.

MR. COX:

I will cite you two union representatives and two company representatives, as a rule, can agree on a fifth man, so in this particular arbitration case it was two selected by the company and two by the union, and, I believe I am right, I wouldn't say it is authority, the Federal (or not) Counciliation Service sent this list of five arbitrators, the company had a right to scratch two and the union had a right to scratch two, and the other one left was "It". I believe we had this ABERNATHY over here from Lubbock.

MR. FISHER:
What I was discussing was the inadequacy if one was not agreed upon. Personally, I don't favor any sort of arbitration.

MR. COX:
I can say one thing on it: As a rule, our arbitration cases have been few and far between throughout the history of our organization. Once in a while, when you can't work out anything between the Union committee and the Company, then you have got to have some place to go for final disposition. That is all of it.

MR. FISHER:
If the Union and Company can not run their business when it comes time to turn it over to somebody else, I think they should both quit.

[64] MR. COX:
Once in a while you find a question you can't agree on. We did it at Greenville, Texas.

MR. FISHER:
I'd as soon you would not mention Greenville.

MR. COX:

But it was finally settled.

MR. FISHER:

Your mentioning Greenville, I think of the cotton mill —

MR. COX:

Our thinking a while ago was you do get deadlocked between company and union, Mr. FISHER, it does not often occur.

MR. GILLESPIE:

It is going to occur a whole lot more often if you have got some set up there for basing it on. No, we can not agree with this. We will get somebody else to agree to it. It discourages working it out.

MR. COX:

No, I disagree. Arbitration is expensive to both sides.

MR. GILLESPIE:

Expense is one big factor, all right, but if you put the people trying to work it out, let them sit down and work on it, get it out of the way before they can go away, they will come to a closer solution satisfactory to everybody.

MR. COX:

Under our type of procedure we proposed the burden is upon the Union and the Company both, to use every effort before they settle.

MR. FISHER:

COX, I don't know about Oklahoma. I think they have the same provision, but if anybody has a [65] Texas insurance policy, either on a house, or on furniture, or on an automobile, will read that fine print (which few of us ever do unless hired to do it) (I never read my own. I read that when I was hired to do it) you find arbitration procedure sets in there and once every three or four years, in my business practicing law, either I represent somebody who had his automobile burned or some company who don't want to pay him, will try that arbitration procedure and I have never yet had one that did it, that the people were satisfied when the arbitration committee got through. The company appoints an adjuster, and I would appoint somebody, and then they would select a third one, and if they found for my man, the company was unhappy, they said it was arbitrarily done, and it wound up in the courthouse and they would not pay me, and after they got the deal stacked against me, which usually happened when I was a party to it, this adjuster would out-vote my man and get a third one to follow suit, would get to reading, I would go to the courthouse, I would not agree. You see, arbitrators don't agree.

MR. MORRIS:

Councilman at Fort Worth has got twelve arbitrators for him.

MR. FISHER:

I'll bet you there has not been anybody in my [66] county satisfied with any of those arbitrations in years. I have not heard of it.

MR. GILLESPIE:

I have had — I was representing a man on an insurance policy loss, we did not want to go to court with the loss (everybody in the courthouse lose anyhow) we studied that arbitration, not much worried with it, three or four months. We went to Post Office Court and got the law suit settled.

MR. FISHER:

It cures me every three or four years when I get in one of them.

MR. GILLESPIE:

Every time they get in that law suit, they get licked. Licking has no place in this. For that brief reason, I am opposed to an arbitration clause, and I think the company policy at this time is to oppose the arbitration clause. I don't mean to say that the company policy on it can not be changed. They tell me there is a change-over policy, and I am convinced right easily, but after looking at the thing from all sides we are opposed to an arbitration clause.

I will say this: That the set up that you sent in, I think it is closer to it than you had in your original proposal, it was not complete in your original proposal.

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RESPONDENT'S EXHIBIT No. 7

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 8th DAY OF JANUARY, A.D., 1954.

APPEARANCES:

FOR THE COMPANY:

C. H. Gillespie, Jr.
O. B. Fisher
V. I. Martin
Fred Honea

FOR THE UNION:

Roy Wellborn
Ralph Cox
W. M. Morris
V. O. Hilley
F. L. Brown
Arthur Phelps

* * * *

[6) **MR. WELLBORN:**
We would like to discuss this seniority problem.

MR. GILLESPIE:
Be glad to discuss it with you.

MR. WELLBORN:
Our position on seniority is that we like for the company to recognize the length of service that an employee spends with his company, and we think also that in recognizing the length of service that the employees in turn recognize that it is necessary to have qualifications to go along with the length of service. And we would like, would certainly like to draft a seniority program here that would recognize the employees seniority in promotions and layoffs, considerating qualifications of a secondary measure, of course. We would consider the seniority as first —

MR. GILLESPIE:
It has always been our opinion and it has seemed to me in making your choice for layoffs, that if you have a senior employee who has the necessary qualifications that it isn't necessary to look any further, because he is certainly entitled to preference over junior people. I don't think you will find any disagreement between the company's position and yours on that in principle. We in our draft have set qualifications above seniority, and [7] of course, we discussed that at some length at the last meeting. Everything else being equal we certainly believe that the senior man ought to get the job, but we don't want to run into a situation, where based solely on seniority a man that can't do the job as well is going to get it over one that can do

it better. And that is the thing we need to work out and get it into an agreeable form in writing.

MR. WELLBORN:

I don't think you will find any of our contracts where promotions or demotions or layoffs are based solely on seniority, but we do like to consider seniority first, realizing of course that it is always necessary to have qualifications too.

MR. FISHER:

The big difference between you on that, Mr. Wellborn, is this fact of which factor are you going to consider as the number one factor. That is, qualifications or length of service. Is that correct?

MR. WELLBORN:

Well, yes.

MR. FISHER:

That is the only difference between what you have said and what Mr. Gillespie has said.

MR. WELLBORN:

I think possibly that is correct. I was quite sure it was the company's policy to recognize seniority, even without an organization. It is in most companies. Of course, they call it length of [8] service, and we call it seniority. It is all the same thing. But I do find that there is a great deal of difference in the application of the length of service combined with the qualifications, because in many instances the company wants to use the qualifications as a number one factor and the seniority as a secondary matter, where we like to reserve it. Not to the extent that we will insist on unqualified people taking the job, but if the senior people are qualified and they are competent, that is all we want.

MR. GILLESPIE:

Well, wouldn't that be the case, whether you considered qualifications first and then seniority —

MR. WELLBORN:

Not the way I read your proposal. See, I believe if I read your proposal correctly, that you consider the most qualified person.

MR. GILLESPIE:

Qualifications being equal, then the senior man.

MR. WELLBORN:

Well, it is pretty difficult to decide, and who would decide whether the qualifications are equal or not?

MR. GILESPIE:

Well, of course, as I understand that, the company will decide on the qualifications for the job.

MR. WELLBORN:

That is possibly where we have difficulty.

[9] MR. GILLESPIE:

The company has no atu
that, but they think that is one of
agement. Now, we are perfectly willing and
ered seniority in most instances of promotions, but

want the management prerogative of picking the best man for the job, and if two men are equally or almost equally qualified, then of course, your senior man. And really I don't thing it is going to cause a great deal of difficulty, because if you have two men of the same inherent qualifications, the one that has been on the job longer is going to have the best qualifications for the job.

MR. WELLBORN:

Usually that is correct. On the other hand, when you consider the most qualified man and you say it is the company's prerogative to judge the qualifications, which, of course; we don't solely agree with, but aside from that, if you leave it up to the company to pick an employee based solely on his qualifications, it is very apparent that top management doesn't know who is the most qualified man, so they in turn have to take the recommendations of the immediate foreman who is working over the employees involved, and you're possibly aware of the fact that it is very easy to use personalities in making selections of that nature. And when you pick your people on the basis of qualifications, there is no indication to the rest of the [10] employees that those people are not picked on the basis of personality involved rather than their actual qualifications. On the other hand, if you take your senior men and decide that the senior man is qualified for the employment involved then you have no problems whatsoever. If he isn't qualified, then you go to the next man in line.

* * * *

[42] MR. GILLESPIE:
Vacations surely must be down at the end of your contract

MR. COX:
Page nine.

MR. WELLBORN:
They are supposed to be in there I wouldn't be too sure of it.

MR. FISHER:
Let me get down to date. Is there any vacation practice down there now?

MR. HONEA:
Yes, there is.

MR. FISHER:
What is your vacation practice?

MR. PHELPS:
One week.

MR. WELLBORNE:
Is that one week of vacation after one year of service?

MR. FISHER:
Is that one week with pay?

MR. PHELPS:
Yes.

MR. MARTIN:

Page seven.

MR. COX:

Mine says nine.

[43] MR. GILLESPIE:

We had so many different copies made up. Paragraph 31.

MR. COX:

Right.

MR. FISHER:

That is settled then.

MR. COX:

What is settled?

MR. FISHER:

The company wants vacations and the union wants vacations. And the next question is whether they'll be paid or not paid. The union wants them paid and the company wants them paid. So that makes two things right there that you have agreed on easy.

MR. WELLBORN:

It wouldn't be a vacation if it wasn't paid.

MR. GILLESPIE:

I can find you some vacations that are not paid.

MR. WELLBORN:
Is that so?

MR. GILLESPIE:
Yeah.

MR. WELLBORN:
And I would like to know where they are at. Are they in the contract?

MR. GILLESPIE:
No. I'm not as familiar with contracts as some of you people. I know a plant or two that they get vacations, but they don't get any pay for them. They are not mills.

MR. WELLBORN:
We're not interested in them anyway. As I understand it, the practice [44] now is one week vacation after one year. Is that correct?

MR. FISHER:
That is correct. That is what we have thus far paid.

MR. WELLBORN:
Is that forty hours pay for one vacation?

MR. HONEA:
Yes.

MR. WELLBORN:
We propose two weeks vacation after two years and three weeks vacation after ten years.

MR. FISHER:

This one week, everybody is agreed on it, one week?

MR. WELLBORN:

I guess the company is if they have given one.

MR. GILLESPIE:

Yes. We'll agree to that.

MR. FISHER:

One week. That is agreeable to you after one year's service. Then you are going to have something to argue about further.

MR. WELLBORN:

Yeah. We want to add to that.

MR. FISHER:

Yeah, but not until more than one year's service, or not until as much as two years service.

MR. WELLBORN:

We're satisfied with one week after one year, and in addition we want two [45] weeks after two years.

MR. FISHER:

Thank you, sir. Let me get this one week after one year, because I've got "agreed on that."

MR. GILLESPIE:

Now, what we told you, I think it was, at the original meeting, — yeah, or maybe it was Cox, I forget which meeting it was, but what we told you on that was that the company hopes to be able to carry out its present vacation plans, but it did not wish to contract to do that. That's what we told them before and on principle we would agree on one week's vacation, and that's what we're doing now, and we hope to heck we can keep on doing it. I don't know of any reason why we can't keep on doing it.

MR. WELLBORN:
You actually agreed on more than principle. You're giving the vacation now.

* * * *

[51] MR. GILLESPIE:
I don't know whether the same thing applies to a mill, but in principle I think it would, but when I take out of here to take a vacation, it costs more than I spend on the vacation, because I lose the production that I would have had if I had been here. It is not exactly the same thing with you, but the same principle is going to apply down there, and the only thing that these men can be paid out of at all is production and sales of products. So while you take one man off, six men off, the mill doesn't shut down, no, but doesn't the production decrease when you take those six out?

* * * *

[53] MR. GILLESPIE:
Those are the boys that we like to hear howl. I don't think we would agree to three weeks after ten years at this time. We hadn't considered that.

MR. WELLBORN:

Strangely enough we didn't expect you to agree to three after ten. We [54] would settle for three after fifteen. In writing the first contract it is very seldom that we put in three after ten. It is usually the second one.

* * * *

[56] MR. GILLESPIE:

I think two after two is too much, but that is something though that I would like to, before making any commitment, I would like to go back and recheck that with the management. We — the position we took on it before was that we would do our darnedest to continue our present vacation practice and also — we didn't say that, but we'll do our darnedest to improve it whenever we can. But the original discussion that we had on it was that we did not want to make a vacation a matter of contract, [57] because, oh, there are quite a few factors, but if we do put the vacations in the contract and then times get to where vacations are not as agreeable as they are now, why, we are going to have a dickens of a time to get you to agree that we take them out. We're for vacations, but we need a little leeway on it.

MR. WELLBORN:

If you got down to the point where you was on the rocks, why, we would certainly sit down and make every effort in the world to see that you stay in business, because we don't want you going broke.

MR. GILLESPIE:

I'm not putting it on a strictly economic basis by any means, because frankly I don't think the mill is going to go broke.

MR. WELLBORN:

I don't think so either.

MR. GILLESPIE:

And if we do, there are several of us sitting around this room that are liable to get a little hungry. But that is something that the policy has been to — the policy has been to give them, and we would like to leave it, to continue it as a matter of policy. And if we got everything else in here worked out, I don't think we would hit a permanent snag on vacations. That is my individual opinion and I would like to confer with the management of the mill. But I do think that kicking them up to two after two is a little too fast, but it does [58] have advantages to the men as well as to the company.

MR. WELLBORN:

Very definitely

MR. GILLESPIE:

And when you get down to the bottom, vacation is an incentive to stay longer and work better, it is money well spent. And the company doesn't give the vacations it gives now solely because it wants to be nice. It is good management policy.

MR. WELLBORN:

I'm certainly glad to see you recognize that, because there is no question about it. It is.

MR. GILLESPIE:

Well, there is a lot of things that are done down there because it is good policy and harmonious relations with the people in the mill is a very essential thing. It has been given a lot of consideration.

MR. WELLBORN:

It sure is.

MR. GILLESPIE:

The approximately fifty people that have been there fifteen years are darn good evidence of that.

MR. WELLBORN:

I would think so, yes.

MR. GILLESPIE:

But we can dig into that and see just how far the company is willing to go on the vacation thing, whether it will put vacations in the contract or not. And if so, how much.

* * * *

[81] **MR. FISHER:**

All right. What about D?

MR. WELLBORN:

Actually I don't [82] think it is necessary to have B or

C either one in there. I propose that I'll write you a no strike clause, and a no lockout clause.

MR. FISHER:
Now, will you provide some penalty in it?

MR. WELLBORN:
I think the law takes care of that, doesn't it?

MR. FISHER:
It does so far as damages are concerned.

MR. WELLBORN:
That is what this refers to, isn't it?

MR. FISHER:
Yes.

MR. GILLESPIE:
The law authorizes you to contract with reference to liquidated damages on it now as I understand it, and we would like to have some liquidated damage feature in there that will work both ways. If we lock you out, we ought to pay for it. If you strike, why, in other words, we want it to work just exactly the same both ways. What we did and what I did on it was to try to set up an average day's pay based on a year's pay, as your measure of damages in that.

MR. WELLBORN:
Well, this C is a pretty far reaching clause that you've got there.

MR. GILLESPIE:

I don't believe it is any further reaching than B. It is almost the exact [83] language of B reversed. If it is not, that is what I intended to do, was to apply the same thing to the union in the event of a strike that we apply to the mill in the event of a lockout.

MR. WELLBORN:

Actually, if I read this C correctly, what this actually means, if we have one group of people that decides to take a walk illegally, then the union, both the local and the international is liable for the damages caused by that particular group of people even though it is unauthorized by the union.

MR. GILLESPIE:

Well, I think probably we could work something out to cover you on that. That wasn't my intention.

MR. WELLBORN:

I didn't think it was.

MR. GILLESPIE:

I think on that if you want to restrict it to strikes authorized by the union, we could just — that we would have to do a little more figuring on it.

MR. FISHER:

Mr. Wellborn is going to write one and I'm certainly willing for him to do it, and I think it is better for him to write one and submit it to us, but in that connection, now, I have seen penalty clauses which take care of the situation suggested by Mr. Wellborn, provided in substance that in the event the union [84] neither condones, aids or abets the strike, why, then the union would be — that is, the international union would be relieved of liability, but the local union and the members would not be, and then down to the next step, if the local didn't aid, condone or ratify or approve it, why, they would be relieved of liability. But those engaging in the act would be liable.

* * * *

[99] MR. WELLBORN:

We're willing to try. How about this paragraph 8? No staggered work week?

MR. GILLESPIE:

As a matter of principle, the company does not have any intention of making a practice of doing that.

MR. WELLBORN:

They don't do it now.

MR. GILLESPIE:

They may in some instances. The fact of the business is, I believe we had somebody up here at one of these sessions that did work a staggered week occasionally. Your maintenance crews usually. And with your maintenance crews, and so it may be necessary. We don't want that in the contract.

MR. WELLBORN:

That is the reason we want it in there.

MR. GILLESPIE:

Well, there are some occasions when that is necessary. As a matter of principle the company does not propose to make a practice [100] of it. But there are situations that arise from time to time that it might be necessary. I think it would be applicable to a small minority of the employees.

MR. WELLBORN:

Do you ever run into a situation where an employee works ten or twelve hours a day until he gets his forty hours and then the company lays him off and gets somebody else to take his place and go on and do his work?

MR. GILLESPIE:

That may happen. I don't think it happens as a regular thing.

MR. WELLBORN:

Mr Martin, you ought to know. Do you ever make a practice of that?

MR. HONEA:

No, we don't make a practice of that.

* * * *

[104] **MR. GILLESPIE:**

How about this paragraph 9?

MR. WELLBORN:

Six cents and eight cents.

MR. GILLESPIE:

Shift differential. If I do remember correctly, we have some shift differential down there now, do we not?

MR. MARTIN:

Yes.

MR. GILLESPIE:

There again that is something I would prefer to leave out as a matter of operating policy. They're making a shift differential. I don't know exactly what it is.

MR. WELLBORN:

What you are actually paying, you won't have any objection to putting it in the contract, will you?

MR. GILLESPIE:

No. If you will put it in that the company will endeavor to maintain the present shift differentials or something like that.

[105] **MR. WELLBORN:**

We don't want to put it that the company will endeavor to maintain it. We want the company to say that they'll maintain it for the life of this contract. Remember, this is a one year contract.

* * * *

[108] **MR. GILLESPIE:**

I don't think there is any disposition on the part of the company to take out the shift differentials. They have been set up voluntarily, because apparently they thought that was the thing to do. But some of your colleagues keep howling about bad times and bad times and I don't like for a contract to do something that we might not be able to keep on doing. I hope they are wrong about saying we are going to have bad times.

* * * * *

RESPONDENT'S EXHIBIT No. 8

[1] CONTACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 29TH DAY OF JANUARY, A. D., 1954

APPEARANCES:

FOR THE COMPANY:

C. H. Gillespie, Jr.
O. B. Fisher
V. I. Martin
Fred Honea

FOR THE UNION:

Ralph Cox
Roy Wellborn
W. M. Morris
Ed Parker
Clyde Cheeks

W. W. Franks
Onie Ray
E. Perkins

* * * *

[42] MR. GILLESPIE:
That daily overtime we can't agree to.

MR. WELLBORN:
I've got it marked down here about four or five different meetings the company unable to consider it. I have been hoping that you would consider it. I guess we're in dispute on that one then. On this paragraph 8 the company has stated it is not their policy to stagger the work week, but they do not want to write it in the contract.

MR. GILLESPIE:
That is correct.

MR. WELLBORN:
But we would like [43] to write it in the contract.

MR. GILLESPIE:
Well, if our little crystal ball was accurate enough for us to know what was going to come up in the future, we would be in better position to consider that, but you can't tell what is going to come up.

MR. WELLBORN:
Well, your past practice is a pretty good guide. You have had this plant about sixteen years and you never staggered the work week.

MR. GILLESPIE:
I don't know.

MR. WELLBORN:
As far as I know you haven't.

MR. GILLESPIE:
Unless there has been some very strong reason for doing it, it hasn't been and won't be done, but I can't be sure that there wouldn't be a condition that would require it. Times are maybe not necessarily out of joint right now, but conditions are pretty uncertain. We don't know what we're going to run into. If we haven't done it in sixteen years, that would be some indication that you really don't need it in the contract. We're not going to do it, we can assure you we are not going to do it unless there is some exceptional cause.

MR. WELLBORN:
Except people like to know what kind of hours they are going to work under [44] during the contract year.

MR. GILLESPIE:
That guide, I don't know of any better guide than the sixteen years that Fant Milling Company has been operating that mill. Of course, there was a history prior to the time Fant operated it. You have been down there longer than sixteen years, haven't you, Mr. Honea?

MR. HONEA:
No, I have been down there about ten years. I don't know just what you mean by a staggered week.

MR. WELLBORN:

That means you won't work a man Monday, Tuesday and Wednesday, and lay him off on Thursday, and then bring him back and work him on Friday and Saturday to keep from paying him overtime.

MR. HONEA:

That has never been done. I'll say this, no employee will ever be treated unfairly.

* * * *

[51] MR. GILLESPIE:

Did you get that re-write up that you were going to do on B and C of our Article 3?

MR. WELLBORN:

I'll take a look at that in just a minute. Give me that one again.

MR. GILLESPIE:

You were going to re-write B. and C of our Article 3. That is those penalty provisions in the event of strikes or lockouts.

MR. WELLBORN:

No, I didn't write that. In the first place, I didn't think it was necessary. In the second place, I didn't know how to figure that deal that you was talking about there. I wrote a notation on strike and lockout clause here, which I think covers everything you want and certainly covers everything that we want. But you notice I left some space down here that you could add to it, because you sure as hell knew that you wanted to do it. I'm sorry I don't have enough of these to go around for everybody, so we'll have to quit off on them here.

MR. GILLESPIE:

That is fine [52] as far as it goes, but it doesn't say what happens if you do.

MR. WELLBORN:

Doesn't the law say you can have recourse through the courts in the way of damages?

MR. GILLESPIE:

If you have agreed on it, which is what I had contemplated there with B and C, that we would agree on the damages and specify them as liquidated damages.

MR. WELLBORN:

You mean in case we pulled a quicky, or we'll say an illegal strike here that was authorized by the union, did you not?

MR. GILLESPIE:

I imagine I meant any time that the people walked out down there and didn't work, because you are the agent for the people.

MR. WELLBORN:

You didn't mean if I happened to be in Chicago for instance, and the people decided to take a walk down here, that you would hold the International Union or the local union responsible for the extent of the damages that you have proposed here?

MR. GILLESPIE:

That was my intention on it.

MR. WELLBORN:

We couldn't ever agree to that one, with that understanding on it, no.

MR. GILLESPIE:

What would you agree to be responsible for?

[53] MR. WELLBORN:

I would agree to be responsible to this extent, that if we authorize an illegal walkout, that we would be responsible for it. Or if we called an illegal walkout, we would be responsible for it. We just don't do those things, that is all.

* * * *

[60] MR. GILLESPIE:

Well, what we write in here has to meet with your approval before we can write it in.

MR. WELLBORN:

Well, we just don't have them. That is all. We certainly wouldn't want to be held responsible for the extent of damages, though, if a group of people just took it on their own to walk out.

MR. GILLESPIE:

Actually I don't think that is too unfair, because you're the representative of those people and they're not going to walk out on you.

MR. WELLBORN:

Maybe they're not going to, but there is a lot of them in the country, especially back in the North and East, that does, as you're well aware of.

* * * *

[78] MR. FISHER:

I know you and I thought from other conversations that there wouldn't be any difficulty about the penalty clause. That is, I mean a penalty clause of some kind. It might not be this penalty [79] clause, but it would be some other effective penalty clause and that's what we —

MR. WELLBORN:

That is what I say, as long as we are not held responsible for strikes we don't authorize. If we authorized an illegal strike, we're willing to pay the penalty. I don't have a fear in the world on that one, but we are sure as hell not going to be held responsible for strikes that we don't authorize.

* * * *

[94] MR. WELLBORN:

I don't like it very much either. There was something we talked in here about the first meeting that we had with Mr. Honea and Mr. Martin that we haven't discussed here, and I would like for you people to start considering it and possibly start doing some work on it. And that is a seniority list of the people working at the plant. Did you ever do anything more about that, Mr. Honea?

MR. HONEA:

No. There is nothing we can do about it.

MR. WELLBORN:

There must be some way we can arrive at getting a seniority list. It is going to have to be done.

MR. HONEA:

Why do you say it is going to have to be done?

MR. WELLBORN:

Well, it is necessary. We can't write a contract unless the people know [95] how long they have been with the company. How are you ever going to establish any seniority at all unless we know when the people started to work for the company?

MR. FISHER:

I imagine the only way that could be done would be to check back on the payroll, just go back to the time the men started to work.

MR. GILLESPIE:

We wouldn't have payrolls back when a lot of them started to work, I don't expect.

MR. HONEA:

No, we wouldn't.

MR. FISHER:

Would have to ask each man. Each man would know about when he started to work.

MR. WELLBORN:

We'll have to do what we suggested in it, ask each man when he started to work and then check back as far as we can. You're familiar enough with contracts to know that we've got to do it. At least have an agreed date when each man started for seniority purposes and for vacation purposes too.

* * * *

[98] MR. MARTIN:

The easiest way would be to attach a little slip to each man's time card and let him put the date on it, and if anything came up prior to 1936, that would have to more or less be arrived at by the man's honesty, but 1936 is quite a while ago.

MR. GILLESPIE:

Eighteen years. [99] If he has been there eighteen years, you can pretty well assume that he is honest.

MR. WELLBORN:

I guess so. Will you do that for us, or will you get that started?

MR. GILLESPIE:

I don't mean that you assume that he wasn't honest if they had just been there sixteen days or eighteen hours, but, Lord, if a man had been there eighteen years, he wouldn't fudge on his seniority, wouldn't need to.

MR. CHEEKS:
I was talking to one a while back and he thought he had been there longer than I had. But I know I had been there longer than he had. They was honest about it.

MR. GILLESPIE:
You'll run into that too. And you may have some difficulty in getting it set up.

MR. WELLBORN:
You can actually check it back to 1936?

MR. MARTIN:
Should be able to.

(Hearing adjourned.)

* * * * *

RESPONDENT'S EXHIBIT No. 9

[55] MR. GILLESPIE:
If we notify the man and he does not come in, that is all there is to it. If we can not find the man, you want us to give you 48 hours to see if you can find him.

MR. WELBORNE:
That is right.

MR. GILLESPIE:
We could probably modify that (d) around that line. We don't want to go and talk to the man and give him 48

hours then talk to the Union and give them 48 hours to come in.

MR. WELBORNE:

If you contact the man, that ends it. If we can't contact him. Many times we know where he is and you don't.

COMMISSIONER MORROW:

Well, then, is it agreeable with both of you to change that (d) to incorporate —

MR. WELBORNE:

We tied that down a little bit tighter in our last contracts, if you would be interested. We had here under (d) "fails to advise the Company of change in address or fails to report within a reasonable time". I don't think we had that [56] "fails to advise the Company of change of address" in this one.

No, it is not in here.

MR. FISHER:

Let me suggest something else, if you will. That is about these laid off employees. Giving a little thought to this laid off employees. You have got in here twelve months.

MR. WELBORNE:

We will take it out if you don't want it.

COMMISSIONER MORROW:

You want it, though?

MR. WELBORNE:

I will give you credit for making an adjustment if you want to take it out.

MR. FISHER:

All right. It's still going to recognize continuous service if he is still an employee, if he is laid off, insofar as his right of recall is concerned.

MR. WELBORNE:

That is good enough for us.

MR. FISHER:

That is what I wanted to think of.

COMMISSIONER MORROW:

You are putting a burden on yourself. You can always go and get the man if you know where he is. What they want to do is tie the thing down so these people — There's all you want. You don't want a fellow that has been off fifteen months if a good man. You have got a right to do it.

MR. FISHER:

I don't know whether you would have or not, if you had some laid off that long.

[57] COMMISSIONER MORROW:

If you had some not laid off that long, here is a senior man. If qualified above it. He has been laid off.

You can't toot out of both sides of that horn.

MR. FISHER:

They should be called back in reverse order of lay off. That seems simple the way you explain it.

MR. WELBORNE:

You have got it explained over here.

MR. FISHER:

You have already apprised the man that decision was made when he was laid off, so need to call them back in the reverse order.

COMMISSIONER MORROW:

You never did get a man in the position you are talking about.

MR. FISHER:

No, you never did.

COMMISSIONER MORROW:

Unless you made a mistake in the first instance, then you would not be in position to take advantage of your mistake.

MR. FISHER:

No. To take advantage of your mistake, that is right.

COMMISSIONER MORROW:

I would think you would want that twelve months in there myself. I don't care.

MR. WELBORNE:

We have got that lay-offs and recalls spelled out pretty plain, exactly what you are saying, except we have got twelve months limit.

MR. FISHER:

I know. You are wrapping it in one package. Take this clause talking about the defining of [58] continuous service.

COMMISSIONER MORROW:

I thought you were talking of this clause as written taking (d), taking out (c).

MR. FISHER:

Take continuous service in connection with what GILLESPIE dictated.

COMMISSIONER MORROW:

That is right.

MR. GILLESPIE:

Now, under that (d), what would be a reasonable time for reporting when called, you actually find a man we want to call back, what is a reasonable time then?

MR. FISHER:

I think we had better spell that out. That is after you notify him and he declines to return, that is the end of it, right that minute, if you send him a letter to his last known address, have a certain time to reply, if you send him word by the foreman, send him word by the foreman, when he received it —

MR. GILLESPIE:

We could set that up if he fails to report after so many hours after actual notice.

MR. FISHER:

That is right.

MR. WELBORNE:

Then if unable to give him actual notice, that is when the Union wants an opportunity to get hold of him, if we can't catch him. If we can't get him, get hold of him, they want 48 hours notice.

MR. FISHER:

I think you can work it along that line [59] what everybody is talking about.

MR. GILLESPIE:

Going through my head is 24 hours time is a reasonable time to report after actual notice.

MR. HONEA:

The practical application is: we want a man now. If not able to work, we want somebody else. That is the practical application.

MR. FISHER:

Still it would not give them 48 hours. You would have 480 hours before he gets back.

MR. GILLESPIE:

If I understand, we would not have to wait 48 hours before putting a man on his job. We would have to wait 48 hours before determining his seniority.

MR. WELBORNE:
That is right.

MR. GILLESPIE:
We need ten men, five senior men don't show up, don't come immediately when they want them. Five junior men do come. We can put five junior men to work that day, but we don't terminate seniority unless they report at that time, is that the understanding of that?

MR. FISHER:
That gets you in an awkward situation.

MR. WELBORNE:
Not necessarily. If you get a man out there —

MR. FISHER:
When called, I gave up my cotton sack, and sold it to my brother for three dollars and a half, then the next day they say, "Well, we called you, that is all a mistake. Go get you another cotton sack."

[60] MR. WELBORNE:
If you ever worked in a mill like that you would not leave a cotton field and work in a plant.

MR. FISHER:
I have been in a cotton field. I have not been in a plant. I would try the plant one time.

COMMISSIONER MORROW:

I don't think you have got to be much worried.

(OFF THE RECORD)

MR. WELBORNE:

Well, we have got several problems in there that I don't think we are too much in disagreement on the principle of the thing, as we are on the actual working of it.

MR. WELBORNE:

Have you got any ideas as to the proper length of time of this recall you would like to add, sir?

MR. GILLESPIE:

Mr. HONEA is an old miller. He says, "When we want them, we want them now," and that is just about the situation.

MR. FISHER:

I believe, Campbell, you can dictate that where MILBOURN will agree on it, and let Mr. LAWLEY type it out.

MR. GILLESPIE:

Start it off: (Following language of Mr. WELBORNE here)

"(a) quits, or

(b) is discharged

(c) has been laid off as long as twelve consecutive months;"

(Now go from there:)

[61] "(d) Fails to report for work when called, if given actual notice, fails to report within ______ hours if given notice by means other than actual notice, as below stated. Insofar as this paragraph is concerned an employee shall be considered to have had notice to report to work when ______ hours have lapsed since there was mailed to him by registered mail to his last known address as shown by the records of the Company a notice to report for work. In the event that the Company does not have in its records or files an address of the employee furnished by the employee either at the time or subsequent to his being laid off, then the Company shall call upon the Union for the address of the employee which shall be given by the Union, within ______ hours, and in the event the Company has no address of the laid off employee and the Union does not have his address it shall not be necessary for notice of any character to be mailed to him and his service shall be deemed to have been broken and terminated."

That is what you have been talking about.

MR. GILLESPIE:
Fails to report.

MR. FISHER:
"Fails to report for work when called, if given actual notice to report within ______ hours if given notice by

means other than actual notice, as below stated. Insofar as this paragraph is concerned an employee shall be considered to have had notice to report to work when ______ hours have elapsed since there was mailed to by registered mail to his last known address as shown by the records of the Company a notice to report for work." I was making that suggestion.

[62] Something to that sense.

MR. GILLESPIE:
I think that is the sense of it.

MR. FISHER:
"In the event that the Company does not have in its records or files an address of the employee furnished by the employee either at the time or subsequent to his being laid off, then the Company shall call upon the Union for the address of the employee which shall be given by the Union, within ______ hours, and in the event the Company has no address of the laid off employee and the Union does not have his address it shall not be necessary for notice of any character to be mailed to him and his service shall be deemed to have been broken and terminated." Something to that sense.

* * * *

RESPONDENT'S EXHIBIT No. 10

[1] FANT MILLING COMPANY
UNION NEGOTIATIONS,
SHERMAN, TEXAS,

ROOM 210 M. & P. BANK BUILDING,

APRIL 8, 1954, 10:00 A.M.

APPEARANCES:

FOR MANAGEMENT:
V. I. MARTIN, Fred HONEA, C. H. GILLESPIE, JR., and O. B. FISHER

COMMITTEE:
Messrs. H. L. DUNCAN, J. E. PARKER, Elmer WARREN, V. O. HILLEY, and W. M. MORRIS.

FOR THE UNION:
Ralph COX, For the International

PRESENT:
Hon. T. F. MORROW, Federal Mediation and Conciliation Service

* * * *

[3] MR. FISHER:

Here is a copy of the Company proposal which was written late last afternoon. It has not been read since it was written in its entirety. I read one paragraph since I have been over here this morning.

MR. GILLESPIE:
I got tangled up.

MR. FISHER:
It may be there are sentences does not make sense.

(OFF THE RECORD)

(MR. COX Asked that the Company go through this, their proposal, and then have a recess where he could [4] go over it with the Committee and analyze it)

* * * *

[5] *Article 5 - Wages*

MR. GILLESPIE:
Then we have Article 5, which is new. We did not have a classification and Schedule of wages in our other proposal, and neither did you. For those of you who don't have a copy of Article 5, Wages: (Reads Article 5 together with Schedule of Wages set out therein)

In other words, the Company reserves the right to increase wages, and it will pay this schedule [6] until both Union and employees have had two weeks notice that it objects to cutting them. You have heard the wage rates. Do you want to go into these individually and discuss them?

MR. COX:
No. We will have to look them over.

MR. HILLEY:
We don't have a proposal for starting wage, do we, in these contracts?

MR. GILLESPIE:

No. ~~These are wages~~, that is the actual wage schedule for the mill. After then setting out the schedule per hour rates:

> "It is expressly understood by the parties that the Company has reserved and does hereby reserve * * during the period of this contract. In the event the Company should put into effect * * giving of notice in writing by the Union."

You gentlemen are closely enough connected with the milling business to know there have been a bunch of mills gont out of business. By the way, Mr. FISHER, the Flour Mill of Fant Milling Company is shut down for business. We don't know how long it will be. That is the first time Fant felt that pinch. With that situation the Company feels it has to reserve the right to do that. We have to stay in business for you to have a job. We ~~don't~~ intend to arbitrarily cut wages. In other words, before a reduction [7] of 40% of the employees we will have to discuss with you if we can't reach an agreement on the reduction, then the Union can give the mill 30 days notice and cancel this contract, wipe it out. That is the sense of the opinion. Actually, the mill hopes it will not have to cut wages and have to shut down. The people who buy bread determine how much we will run. We reserve the right to increase wages and we hope that is what we can do, but with times going the way they have been going, we thought we would have to reserve that right at any time, any other reduction, but in fairness to the Union and the employees, we will give them two weeks notice, and try to explain, keep them happy about it. If we can't keep you happy, we don't intend to tie the Company down to this contract. Any other discussion about that contract?

MR. COX:

Not at this time.

* * * *

[55] MR. COX:

I want the Company to come down here in the Feed Mill operation and look at something, to make it plain. You have got too many classifications on the same wage rate. I don't think that you think it is fair. We don't either. Here is a grinder with more responsibility than a trucker, all the same wage rate. Here is a sewing machine operator.

* * * *

[57] MR. FISHER:

You may be right. Maybe the Company should have made a difference heretofore, but you have got this Company's position while trying to work out a contract, you have got the Company's position that the Company is unwilling to contract any wage increase now, when you commence to meet that situation, then commence taking money off of a sweeper and adding it to a grinder, for instance, you are going to have unhappy men.

MR. COX:

Wait. I did not say that money off that sweeper or trucker.

MR. FISHER:

I know. Take the Company's position, recognize it, that they want to try to keep paying what they are paying and then you commence changing the pay rate, that is being paid, every time you add one being paid you have got to hurt the Company bad with its employees.

MR. COX:

I am not proposing to take money off anybody.

MR. FISHER:

I misunderstood your proposal. I understood [58] your proposal you wanted one of these men to get more pay then the other got, more pay.

MR. COX:

I do, $1.30 and go on up.

MR. FISHER:

I know. The Company is unwilling to increase wages.

COMMISSIONER MORROW:

You would have to if you did what COX wanted you to do. He does not want any decrease.

MR. COX:

No, sir. I did not. Don't get that in the record.

* * * *

[61] MR. GILLESPIE:

That is something I don't believe any question but we have got to do some looking into, what we can work out under this set up. I don't know, but it looks like we need to do some checking on it.

MR. DUNCAN:

The Committee would be willing to get with Mr. MARTIN, and Mr. HONEA, where we could all fully understand it.

MR. MORRIS:

Why don't we do this, Mr. MARTIN and Mr. HONEA, as well as Mr. BLACKBURN. Mr. BLACKBURN will take the responsibility of going.

[62] MR. FISHER:

I think that is a good suggestion. I am not going to be able to meet next week, they have got me. They could do that next week, and get back together in another two weeks.

(After much discussion it was tentatively agreed that the negotiations would be resumed at 10:30 o'clock A.M. April 22, 1954)

RESPONDENT'S EXHIBIT No. 11

[1] FANT MILLING COMPANY
UNION NEGOTIATIONS,
SHERMAN, TEXAS, ROOM 210
M. & P. BANK BUILDING,

APRIL 22, 1954, 10:30 A. M.

APPEARANCES:

FOR MANAGEMENT:

Messrs. Fred HONEA, V. I. MARTIN, C. H. GILLESPIE, JR., and O. B. FISHER.

FOR THE UNION:

Mr. Ralph COX, for the International

COMMITTEE:

Messrs. Elmer WARREN, V. O. HILLEY, Gene YEARY (For Mr. DUNCAN), and Arthur PHELPS (for Mr. Parker), W. M. MORRIS.
(Commissioner T. F. MORROW not Present)

Article 5 — Wages

GILLESPIE:

Mr. COX, we got to thinking about that Article 5 since we had withdrawn it, and were going to re-write it. We thought we would re-submit it. In other words, it is going to be our proposal. We just took it back, made the changes, and brought them all into here.

(OFF THE RECORD)

I can point out the changes we made in it to you pretty quick so you won't have to go through the whole thing. The first one is down under Continuous Operations Department, pellet machine operator, Feed Mill, pellet machine operator, we think that ought to be $1.46 instead of $1.41, batch mixer operator, we think ought to [2] be $1.41 instead of $1.36, grain handler, we think ought to be $1.41 instead of $1.36, packer, we think ought to be $1.39 instead of $1.36, and the grinders we think ought to be $1.38 instead of $1.36. That gives you a spread there in that Feed Mill we had overlooked not having. The other changes run — they are over on the second page in the Maintenance Department. We thought we needed some new classifications in there.

Mechanic Class 3 is new, and the Electrician's Helper, advanced, is new, and the mechanic's helper, advanced, is new. We think with those changes will make that schedule work out more fairly, more right. We did make a shift differential on to No. 5, say, put in the temporary employees started in at 10c an hour less than the real rate during the starting period. Those are changes we made in our proposed Article 5. I don't think you have seen this one, Mr. FISHER. (Hands copy of printed contract to Mr. FISHER)

* * * *

[7] MR. GILLESPIE:

Our attitude on the thing, Mr. COX, we want to be absolutely fair on it. We want to give a fair day's pay for a fair day's work. We realize people where differentials are not big enough, where wages are not big enough, will not be satisfied, won't work well enough. At the same time, we want you all to realize, you have got to operate in competition with a whole lot of boys bigger than we have, they have bigger machines for packaging, different [8] operations, machines where we do them by man power, or woman power, I have seen some packaging operations where the stuff goes out, is not even touched by hand, they throw it into small bags and small packages are dropped up in big package, it stamps it, all you have to do is put it on a truck, put it in the car to ship out. We are not that far mechanized with our packaging. If we can keep on with the type of operation, and do it economically, we may not have to go through all that mechanical stuff. It gets to be a problem as to whether the decision and interest on a machine is cheaper than doing a lot of work by hand and not having machines. It has got to be balanced out in there. It is an economic problem that management has always got to worry about.

MR. COX:

I will say this: It gives us something to consider. I also want to say, as I have told you in the past meetings: The Union does not agree this first paragraph here, that is something we never had to face before. I feel once we write these wages in a contract — You can see our thinking on it, what will happen if we give you the right to increase [9] one or all, increase some and don't increase all, it will cause dissension among the employees, we certainly can't at this time agree to a paragraph of that type.

MR. GILLESPIE:

Of course, we backed off from some of our original proposition in that we agreed to give you notice before we make those increases and even in our original proposal we didn't reserve the right to cut wages without coming to you. I can't see why — I could see why you would squawk if we reserve the right to cut them, but if we find a place where a man is not getting the right pay, or it is unfair, we don't like to have to call a meeting, amend our whole contract, etc. to raise that guy's pay. We agree they ought to probably negotiate before we cut pay, but the right to raise it is a different deal. It is for the benefit of the people, not against them.

MR. COX:

You don't contend by this paragraph it gives you the right to cut wages?

MR. FISHER:
With two weeks notice.

MR. GILLESPIE:
We can increase them without notice. Wait a minute.

MR. FISHER:
That was the intention of it, I think, GILLESPIE, to increase them without notice.

[10] MR. GILLESPIE:
Increase them without notice?

MR. FISHER:
If there is serious objection to it we might set out the basis for the increase. I don't think we ought to recede from the idea of paying a man or increasing his wages where he does unusual and out of the ordinary work, there ought to be some reward for it, a man shows an interest, hits the ball or his job.

MR. GILLESPIE:
Your idea on that we include the Company shall have the right to increase wages of any or all employees on a merit basis, something like that?

MR. FISHER:
That is right.

MR. GILLESPIE:
To get down to it, COX, what we are interested in, is production.

MR. COX:

That is true.

MR. GILLESPIE:

If somebody hits the ball, increases production, we think he is entitled to a fair share of the increase; in other words, when you increase your production without increasing your man hours you are increasing your profit, and the Company is perfectly willing for the guys that dig in, make that increase in profits, to share in it, we think they ought to. Because it is not particularly our mill, or your mill either one, [11] it is not the management's mill, or worker's mill, it is the whole group have got to get together and operate it. Of course, management, the stockholders have got a tremendous investment down there, without that investment there would not be jobs for anybody. We think they are entitled to a fair return on it. Still, at the same time, stockholders are not interested in riding down on all the men, taking all of the profits, they are perfectly willing for them to go along over six or eight years your pay checks reflect that. Pay checks have gone up. Pay checks have gone up a whole lot more than dividend checks have.

MR. FISHER:

GILLESPIE, I believe during the noon hour sometime in view of this compensation we ought to re-write this Paragraph 5 and change it so it will set out a little more pointedly what we are talking about:

MR. GILLESPIE:

We could do that, or we might interline it on there. We will have to re-copy that into the contract eventually.

MR. FISHER:

What I had in mind, re-write that paragraph.

MR. GILLESPIE:

Re-write that, scratch it out? I think that is a good idea.

* * * *

[13] MR. COX:

Then you are going to re-write that top clause during the noon hour? We will take a look at it and give consideration to your proposal and analyze it, look it over.

* * * *

[34] MR. COX:

I am going to give you one, a package to go chew on at the noon hour.

MR. MARTIN:

My teeth are bad, too, COX.

MR. GILLESPIE:

Give us time to eat. Don't make us chew on that, and nothing else.

MR. COX:

All right. In all our past meetings the Company objected to arbitration clause in the contract. I presume their position is the same.

MR. GILLESPIE:

Yes, sir.

[35] *ARBITRATION — NO STRIKE, NO LOCKOUT*

MR. COX:

So, if the Company is willing to leave out the "no-strike, no lock-out" clause out of the contract, we will leave out the arbitration clause. Now we can go to lunch.

MR. GILLESPIE:

I don't know we will eat or not. You gave us that small package to chew on.

(The meeting was recessed at 12:05 until 1:30 P. M.)

Article 10 — Responsibility of Management

MR. GILLESPIE:

Mr. COX, we have checked through that tidy little morsel you gave us to chew on, a considerable bite for one time. We don't believe we can go along with you on it, if something in that management clause needs to be re-classified, re-worked, we can re-work it, we think we are going to have a "no-strike" clause in there. No point in having a contract unless you have a "no-strike, no lock-out" provision in it. We still don't like that arbitration. We don't think you are that hard to get along with. We think we can work it out, a group of us, a bunch across the table. On the management clause, we don't want to be arbitrary, if some of that you want to check into and re-work, we will be glad to discuss it further. We do want a management clause because the Act itself recognizes the responsibilities of management. We don't want to tie that down [36] too much, but that is the result of our working is over during noon.

* * * *

RESPONDENT'S EXHIBIT No. 2

[1] CONTRACT NEGOTIATIONS MEETING
FANT MILLING COMPANY AND
AMERICAN FEDERATION OF GRAIN
MILLERS, A.F. of L.

Held in the offices of
Gillespie & Gillespie
M. & P. Bank Building
Sherman, Texas

May 6, 1954

10:30 o'clock A.M.

PRESENT AT THE MEETING:
- MR. T. F. MORROW, Commissioner
- MR. O. B. FISHER
- MR. C. H. GILLESPIE
- MR. FRED HONEA
- MR. ROY WELLBORN
- MR. V. I. MARTIN
- MR. RALPH COX

COMMITTEE MEMBERS:
- MR. WARREN
- MR. HILLEY
- MR. MORRIS
- MR. BURCHFIELD
- MR. YEARY

* * * *

[24] MR. FISHER:

And he wouldn't know what trucker was going to come in necessarily.

MR. WELLBORN:

Well, then, you had better get you a new truck dispatcher.

A COMMITTEEMAN:

These orders are generally made up today for tomorrow's outgoing stuff.

MR. GILLESPIE:

Generally they can schedule it but there are time an order will come in on the telephone and you will need a truck driver that you didn't know thirty minutes before you would need.

MR. FISHER:

What is the practice if a truck [25] driver gets in from Abilene at 8:30 at night?

A COMMITTEEMAN:

He checks in at the office. Generally they leave a note for him to come in. If there is no note, he assumes he will come in at the regular shift.

MR. FISHER:

If he came in at 2:00 o'clock in the morning?

A COMMITTEEMAN:

The same thing.

MR. FISHER:
Under regular practice he would be back at 7:00?

A COMMITTEEMAN:
That is right.

MR. WELLBORN:
Unless otherwise isntructed. That is usually the same procedure we have —

MR. FISHER:
Are there occasions when they drive all night and don't get in until 6:00 o'clock in the morning?

A COMMITTEEMAN:
Well, if he makes it, it is possible.

MR FISHER:
Then is it the practice, when that happens, that that man leaves his truck and reports back at 7:00?

A COMMITTEEMAN:
Well, you know the law of averages says you have got to get so much sleep.

MR. FISHER:
I think so.

A COMMITTEEMAN:
If he can, he comes on down or [26] calls down or something in the morning.

MR. FISHER:

That is the situation I was trying to find out, just what the practice is. I don't know.

MR. WELLBORN:

If a man has been out all day and night, he wouldn't be expected to get back.

MR. FISHER:

He certainly wouldn't be acceptable to the Company as a truck driver the next morning.

COMMISSIONER MORROW:

I don't imagine the insurance company would like that.

MR. MARTIN:

I don't imagine they would.

A COMMITTEEMAN:

These orders are made up today for outgoing and they leave in the morning anywhere from 7:00 to 8:00 o'clock. It would be difficult for me, it seems like, for these orders to be called in and filled when they have to run most of the stuff a whole truckload.

MR. WELLBORN:

Doesn't each one of your truck drivers have instructions left on a note there in the office as to what shift he will take the next day or what run he will take?

A COMMITTEEMAN:

If there is no note there, he presumes to come in at 7:00 or 8:00 o'clock, whatever time he is used to coming in.

MR. GILLESPIE:

On these orders made up the day before, isn't the truck driver instructed the night before when he punches out the day before that he will pick up that [27] load at that place the next day?

* * * *

[72] MR. WELLBORN:

Well, good. As long as you try to satisfy me, why, our people will be satisfied, too.

We would like to discuss the grievance procedure that we proposed in our original submission to the Company.

[73] MR. GILLESPIE:

How many times have we discussed that one so far?

MR. WELLBORN:

Of course, we will go along without a discussion if you want to agree to our proposal on it.

MR. GILLESPIE:

We will do the same thing with our proposal on it.

MR. WELLBORN:

I don't see any grievance procedure in your proposal. You have got a one-way street there without regard to the rights of employees.

MR. GILLESPIE:

I don't think so, Mr. Wellborn. You are entitled to your opinion. We have no objection to your expressing it, but we don't agree with it.

MR. WELLBORN:

Well, I was in hopes you wouldn't object to my expressing my opinion on it.

MR. GILLESPIE:

What do you want to discuss about it?

MR. WELLBORN:

We would like to arrive at an agreement on a type of grievance procedure whereby if there is a grievance arising in the plant that the people have an opportunity to take them up and discuss them and conclude them to the satisfaction of everyone concerned.

MR. GILLESPIE:

The last time we went over that grievance procedure, we went over it pretty thoroughly and we revised our grievance procedure in light of that earlier discussion, added several steps to our original [74] proposal. As I remember it, the thing that we have not been able to agree on is that you insist on arbitration and we insist on no arbitration. We want to work it out between the employee and the Union and the Company. We think that it can be worked out that way.

MR. WELLBORN:

Well, do you think it is fair to the employees if we say, for instance, where it says, "If the President hears the appeal, he shall make determination thereafter in writing and such determination shall be final."?

MR. GILLESPIE:

We do. We think that the President is definitely interested in the welfare of the employees and the proper operation of the plant and that his decision will be fair. He is far enough removed from any personalities or mill politics, if that is what you want to call it, to where he certainly should be able to take an entirely unbiased view on it. And we have steadfastly maintained that the President, not only the President, but the operating vice presidents of the mill, don't look on the mill or the Management and the employees as different people. Their attitude is that it is all one operation, that the people have to be satisfied in the operation, and they do their best to work things out on a just basis to create satisfaction.

MR. WELLBORN:

Wouldn't it be just as logical to [75] say that the local President of the Union would have the final determination of the adjustment of a grievance?

MR. GILLESPIE:

No, I don't think so. Your local President of your Union is a protagonist. If I understand the situation correctly, the local President of the Union is not an employee of Fant Milling Company. I think he works for Quaker.

MR. WELLBORN:

Of course, we had a man that was acting in the capacity or the same capacity as the local President of the Union so far as Fant Milling Company was concerned, until you people dispensed with his services.

MR. GILLESPIE:

Well, I was under the impression — I forget the man's name, that actually a Quaker employee was President of Local 64.

MR. WELLBORN:

Actually an employee of Quaker is President of Local 64 but we have a man negotiated as Chief Steward who acts in the same capacity so far as your plant would be concerned here.

MR. GILLESPIE:

Now, without intending to step on any toes or offend anybody, I really don't believe that your steward there in the mill, whoever he might be, would be in as unbiased position as the President of the mill would be to pass on that, because his job is similar to a lawyer's job; he is to represent one side. As far as Mr. Fant is concerned, there isn't just one side or the other [76] side; it is all the mill.

MR. WELLBORN:

Well, he actually represents what he thinks is the best interest of the mill so far as making profits is concerned, doesn't he?

MR. GILLESPIE:

Well, it is not altogether profit, but that is usually where you judge the success of the operation. There have been quite a few things that Mr. Fant and the other executive officers have done that have definitely not added to the profits at the time. They might have added to the long range profit but they have done quite a few things that have actually added to the cost that didn't add anything to the profit at the time it was done.

MR. WELLBORN:

That is quite possible.

MR. GILLESPIE:

The specific instance that I have in mind is the day that the flour fill was shut down here within the last six weeks and the employees of that mill were given work of general cleanup or pulling nails just so they wouldn't be laid off for a day. That, I think, was a step toward keeping the profits of the mill up because it tends to keep the people employed and happy, but for that particular day it certainly was an actual cash loss. I don't mean that they didn't accomplish something for the work but there was no production that day; instead of just laying everybody off, they found other things for [77] them to do so they could keep on.

MR. WELLBORN:

Isn't that a usual practice in such cases with most companies?

MR. GILLESPIE:

No, not within my knowledge. I know of some when there is a day with nothing to be done they just shut down and cut off the payroll for that day, and I don't mean to imply that Fant will always be able to do that, either. If we had to shut down for several days why, it would be impossible to make work to keep them going.

MR. WELLBORN:

We certainly wouldn't feel that we were representing our people adequately if we agreed to a grievance procedure such as you have presented here where the Company has the final say with no appeal whatsoever on the grievance.

MR. GILLESPIE:

Mr. Wellborn you always have an appeal to the Court if the decision of the Company is arbitrary.

MR. WELLBORN:

We don't particularly care about going into Court on cases of that nature.

MR. GILLESPIE:

Well, it is an avenue of appeal though.

MR. WELLBORN:

Not under this contract, it wouldn't be, because you have asked here that the President of the Company have the final decision of it and if we agreed to it, we wouldn't be — have access to the Court on it.

[78] MR. GILLESPIE:

I think you would have access of the Court if his decision was arbitrary.

MR. WELLBORN:

I wouldn't want to try a case on that.

MR. GILLESPIE:

I don't think you could win a case on it because I don't think you could prove he was arbitrary.

MR. WELLBORN:

If I agreed to a proposal of this nature, I wouldn't be silly enough to try to go to Court on it.

MR. GILLESPIE:

Do you have any other proposal as a substitute for arbitration

MR. WELLBORN:

No. We have arbitration in all our contracts. I don't necessarily care for them myself but it is a means whereby you can settle disagreements peaceably. In fact, I have never had but one arbitration case since I have been with this organization.

MR. GILLESPIE:

Well, if, of course, have never had any experience with this organization on arbitration but I have seen other arbitration clauses where some of the silliest things imaginable have been taken into arbitration and it just takes times and takes your people off productive work and you spend more time grieving than you do working in some instances on those things.

MR. WELLBORN:

We have a very simple reason why [79] we don't like to go to arbitration because we don't feel an outside arbitrator can settle a dispute as it should be whereby the people more closely associated with it can agree among themselves. Once in a great while you may run into a situation —

MR. GILLESPIE:

That is our situation exactly. We want to settle it right there at the mill in our own family. That includes you as a representative of the International Union as a member of the family. We have set up in our proposal for the International to be represented in the discussion on it.

MR. WELLBORN:
I can sure do a lot of good where the President of the Company had the final decision to make.

MR. GILLESPIE:
I think you could do a lot of good. The history down there has been that the doors of the executive offices were open, and if a man is aggrieved he has gotten a hearing, and I don't think there have been many that have been decided arbitrarily. I don't know of any that have. Now, there are instances, of course, where a man feels aggrieved and whatever is decided, if it doesn't go his way, he is going to think it is arbitrary.

MR. WELLBORN:
Well, I think the records we have here of only having one arbitration in practically twenty years is a pretty good indication that we certainly like to come to peaceable agreement without resorting to arbitration.

[80] MR. GILLESPIE:
If you only used it once in twenty years, I don't see any particular point in putting it in there.

MR. WELLBORN:
It is there to be used if it becomes necessary. That is the only point that we want it put in for.

MR. GILLESPIE:

We make a very serious effort to give a man a fair deal, but to be perfectly frank with you, we are afraid with the arbitration clause that instead of settling it among ourselves and getting it over with and everybody back to work in a short time, that we will have those things hanging and hanging.

MR. WELLBORN:

Well, I think you are aware that we have never had an arbitration case with your competitor across the street here and we have been associated with that for practically ten or twelve years, anyway.

MR. GILLESPIE:

I have never heard of one. I am sure that you haven't had one. We really have no knowledge one way or the other on it.

MR. WELLBORN:

But we did have an arbitration procedure in the contract whereby if it becomes necessary to use it we can. Not only we can but the Company can, too. It is available to either party.

MR. GILLESPIE:

We are a hundred percent in agreement with your idea that no outside man coming in can [81] settle anything as well or as quickly as we can among ourselves. What we have tried to do in our proposal is to work out an actual workable grievance procedure that will get these things settled. We have stopped short of that arbitration. Now, if there is anything you would like to add in our procedure short of the arbitration, why, we'll be glad to discuss that with you, or we will be glad to discuss arbitration with you, but very frankly, we have no intention of putting an arbitration clause in.

* * * *

[83] MR. WELLBORN:

We certainly cannot afford to bargain away the right of your employees to give the Company the unilateral right of settling grievances. We are just in no position to do it at all.

MR. GILLESPIE:

Well, of course, we are in no position to bargain away the right of the Management to operate the mill in a fair and considerate manner.

MR. WELLBORN:

We are not asking you to bargain away those rights. The only thing we ask you to do is recognize the rights of your people, your employees.

MR. GILLESPIE:

That we are glad to do.

MR. WELLBORN:

And a grievance procedure and an arbitration procedure is a means of settling something where you cannot arrive at settlement under your contract. We are entitled to that right.

MR. GILLESPIE:

In a great many instances that I have seen, it is a method of your arbitration — your arbitration is a method of killing all attempts to work out grievances. You go through all the form and submit it to arbitration.

MR. WELLBORN:

Maybe some Unions are arbitration happy, but we are not.

MR. GILLESPIE:

Now, you haven't had more than one arbitration in twenty years. I am just thinking out loud. [84] This is not a proposal. Suppose we set up an arbitration provision in there and provided in the contract that it won't be used but once in twenty years? (Laughter). Just take you at your word and put it in there.

MR. WELLBORN:

That is possibly a reason why we haven't had but one arbitration in twenty years, by the mere fact we have the machinery in the contract to arbitrate, is certainly a factor in the Company or the Management's decision in being fair to a grievance when it arises.

MR. GILLESPIE:

Then if you put it in there on that basis, you still have it in there and we would have the proposition of your representation that you have only used it once in twenty years. You want it in there but you don't want to use it.

MR. WELLBORN:

That is correct. That is a correct statement. We want it in there but we don't want to use it.

MR. GILLESPIE:

Why put it in there without putting a limitation on its use?

* * * *

RESPONDENT'S EXHIBIT No. 12

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 21ST DAY OF MAY, A. D., 1954:

APPEARANCES:

FOR THE COMPANY:

C. H. Gillespie, Jr.
O. B. Fisher
V. I. Martin

FOR THE UNION:
Ralph Cox
W. M. Morris
V. O. Hilley
Arthur Phelps
Onie Ray
Elmer Warren

HEARING HELD BEFORE MR. TED MORROW, AS COMMISSIONER.

* * * *

[2] MR. FISHER:

We were to rewrite the company proposal covering the increase of wages sought by the company, or the privilege of increasing wages sought by the company, during the contract period under Article V of the company proposal headed, "Wages." So we now have that proposal rewritten. It will be noted that the proposal also embodies a procedure for reduction of wages during the contract period by the company. We did not recopy the wage [3] schedule, the same rate schedule submitted before would be tied in after this.

MR. COX:

Well, I see you have rewritten this, but the meaning is practically the same as it was in the other proposal that we objected to.

MR. FISHER:

What part of it is objected to, Mr. Cox?

MR. COX:
Well —

MR. FISHER:
Disregarding the listings of the hourly pay.

MR. COX:
I think, we told you —

MR. FISHER:
I mean what is objectionable about the general provision?

MR. COX:
As we told you all through the negotiations we don't want to leave it wide open so that the company can raise or lower all employees at their option or reduce wages; whenever we sign up a contract we want that to be it for at least one year.

MR. FISHER:
I know that it is certainly desirable, but the company feels that it could insist on a procedure being written to the contract for the reduction of wages. And Mr. Gillespie and I in framing this had in mind to make it so it would be acceptable to the union, which accounts for the provision granting the union [4] the privilege at its option to terminate the contract after negotiation on a wage reduction, if the wages are decreased without the consent of the union. Did you notice that part of it?

MR. COX:
Uh huh.

MR. GILLESPIE:

I don't see how you can object to raising wages under any circumstances. And we fixed that so if the company thinks a reduction is necessary, it gives you notice to negotiate it, and then if you don't agree with us on it, which you probably will if it becomes necessary to reduce them, then you can terminate the contract.

* * * *

[6] MR. COX:

Our position is that we like to set up certain wage rates for a certain classification, and that will be it. The people on it will draw that rate, know they are going to draw that rate for a year.

* * * *

25] MR. COX:

I believe when we broke up our last meeting our discussion was on arbitration. And all at once the meeting broke up and we never did get that straightened out.

MR. GILLESPIE:

My recollection of that particular feature is that you all were going to consider the suggestion which was not a proposal that if arbitration were put in, there would be some limitation on the number of times it could be used. We would like to have your thinking on that suggestion so that maybe we can draft a proposal on it. But we don't want to pass this wage business. We need to know about that. If you want to talk about the arbitration first and then get back to wages, we'll be glad to do it. If you remember at the last meeting, I believe it was Mr. Wellborn stated only once in twenty years had arbitration been resorted to in all of the union's contracts. And as a tentative suggestion to try and find a middle ground I suggested the possibility that we might limit arbitration to being used once every twenty years and [26] then we discussed the fact that the contract couldn't run more than one year, and we cut that down to no more than once in one year and you all were going to consider that and tell us what you thought about it.

MR. COX:

Why would you want on arbitration to put a limit on in there how many times it could be used?

MR. GILLESPIE:

Because with an arbitration clause in there you are going to go to arbitration in a great many cases where it is not necessary. If you've got some limitation on it, then we sit down and work these things out within the grievance procedure, get them settled and over with. We know — by we, I mean you and the shop stewards and the company management, know more about the problems and conditions there in the Fant Milling Company than any possible outside person, and we want the thing set up so that all of our misunderstandings can be worked out right down there with the least fuss and bother over it. Now, if arbitration is something that has got to be in there, or you won't sign the contract, then we would like to have some limitation on its use. We don't want to arbitrate everything that comes up. We want to settle them.

MR. FISHER:

Of course, the company just don't arbitration.

MR. GILLESPIE:

We don't want [27] it at all. That is why we made the suggestion to explore the possibility rather than a proposal. If you would like, if you haven't discussed that feature with your committee, we'll pull out and let you talk it over with them and see what they think about it. I don't know whether you have discussed it with them or not. We've got one of the small mills, not a part of any big chain of mills. We have a relatively small group of employees. We are all pretty well acquainted with each other, and we think that they can work out their differences probably without ever going beyond the second step of the proposed grievance procedure and the situation is not the same with these tremendous mills with four or five times as many employees that are tied in with a whole chain.

MR. COX:

You stated that you wanted a grievance procedure whereby they would work out most of the grievances and not go into arbitration. If you will go back to our original proposal and read it step by step, you'll find that we got that same thing. In other words, neither side wants to arbitrate. Most of the time they want to sit down and neither side wants to go to arbitration, but once in a while it becomes essential. We've got to have that protection.

MR. GILLESPIE:

If it becomes a necessity once in twenty years of experience that you and [28] Mr. Wellborn have had, I think once in one year would certainly be a reasonable suggestion here. We left that in that shape last time. You all were going to tell us what you thought about that suggestion, and as I say —

* * * *

[34] MR. FISHER:

While you're on [35] that subject of getting something between now and the next meeting, or by the next meeting, what about wages and giving us that before the meeting if you can?

MR. COX:

I can give you an answer now on your proposal that you proposed today, we cannot agree now or at any time to give the company the unilateral right to raise or lower wages during the life of the contract.

MR. FISHER:

What about the wages on the different jobs? That is what I had reference to. You had already been pretty positive about that other, but I think you will change your mind maybe. That is, if you agreed on the dollars and cents, I certainly wouldn't expect you to be too obstinate on raising a few cents.

MR. COX:

You want a proposal on wages?

MR. FISHER:

Yes.

MR. HILLEY:

Two bits an hour all around.

MR. GILLESPIE:
Is that minimum or maximum?

MR. HILLEY:
Just throw them both in there for good measure.

MR. COX:
If you want one, I can give it to you. Fifteen cents an hour general increase for all classifications.

* * * *

RESPONDENT'S EXHIBIT No. 14

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 2ND DAY OF JULY, A. D., 1954.

BEFORE MR. T. F. MORROW, COMMISSIONER.

APPEARANCES:

FOR THE COMPANY:
C. H. Gillespie, Jr.
O. B. Fisher
V. I. Martin

FOR THE UNION:

Roy Wellborn
Ralph Cox
B. G. Burchfield
V. O. Hilley
Elmer Warren
H. L. Duncan

* * * *

[28] **MR. COX:**

Say, I want to ask a question. What happened to the seniority list that you promised last August you was going to get for us?

MR. GILLESPIE:

Seniority list. Well, I don't know.

[29] **MR. FISHER:**

Don't even remember promising it.

MR. COX:

You wasn't even here in August.

MR. FISHER:

Well, I am not accused of promising it.

MR. GILLESPIE:

September 5th is the first time he showed up.

MR. COX:

Well, maybe it was September 5th. I know it was way back yonder.

MR. FISHER:

Well, there is no reason not to give you the man's name on each job, the date of his employment. That is what you want, isn't it?

MR. COX:

That is what you call a seniority list.

MR. GILLESPIE:

I guess we have the records and the date of employment.

MR. MARTIN:

On the majority of them.

MR. GILLESPIE:

May not even have the date of employment on some of them.

MR. MARTIN:

Not on some of them. You always run into that.

MR. FISHER:

About what — do you have — do you keep a personnel card on each employee?

[30] **MR. MARTIN:**

We do now. Practically no company kept any records like that twenty years ago.

MR. FISHER:

No, they didn't twenty years ago, but you show on the personnel cards you do keep?

MR. MARTIN:
Yeah.

MR. FISHER:
When a man was employed since you started keeping those cards?

MR. MARTIN:
Most of those started on January 1st, 1936 when social security went in effect.

MR. FISHER:
Cox, what about us giving it to you for what we have instead of going around and interviewing each employee, checking around?

MR. COX:
Well, I think your company could pretty well ascertain a seniority list.

MR. MORROW:
You are not going to be worried much about a senior man that was working past 1936.

MR. COX:
Well, we might. You never know.

MR. MORROW:
I hope not. If you do, if we're going to have to go back that far, —

MR. COX:

I can tell you what I [31] do. Mr. Martin said he didn't know very many companies before social security kept any record. I can go right to Pillsbury —

MR. FISHER:

Give us a list of the employees that you had when you had the election.

MR. MARTIN:

You wouldn't count the average mill that you have as one of your union's comparable to Pillsbury, would you?

MR. COX:

Come again.

MR. MARTIN:

I say you wouldn't call the average mill that you have a contract with comparable to Pillsbury, would you? Pillsbury has thousands of employees. They probably had personnel records for years even before it was thought of by a majority of the mills.

MR. COX:

That is possibly true.

MR. MARTIN:

Sure it is.

MR. FISHER:

Cox, would it serve your purpose to take a list of the production and maintenance employees as used in the election and place on it the date that each person was employed?

MR. COX:

Well, I think we ought to have — there is possibly some new ones down there now. They can surely give us the dates on them. Martin knows what I mean by seniority list. Pillsbury has still got my record when I went to work.

MR. MARTIN:

I am sure they have. [32] Probably some other places they have got your record.

* * * *

[41] MR. GILLESPIE:

We haven't talked about wages for a long time. Don't you want to?

MR. COX:

The hell we didn't. We spent the whole day we met on them. You never give me an answer on vacations. I asked you for an answer on vacations.

MR. GILLESPIE:

We gave you an answer on vacations a long time ago. We'll do the best we can to keep on what we're doing on vacations now. We ain't going to guarantee those. We have recognized the holidays. And vacations if circumstances permit we have given one week. I have definite instructions no three week vacations, no interest in two week vacations.

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RESPONDENT'S EXHIBIT No. 16

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF of L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 30TH DAY OF JULY, A. D., 1954.

BEFORE MR. TED MORROW, COMMISSIONER

APPEARANCES:

FOR THE COMPANY:
C. H. Gillespie, Jr.
O. B. Fisher
V. I. Martin
Fred Honea

FOR THE UNION:
Ralph Cox
V. O. Hilley
B. G. Burchfield
Elmer Warren
H. L. Duncan

* * * *

[34] MR. GILLESPIE:

We certainly don't want any understandings outside the contract. We certainly think that we ought to get that understood provision specified in there and take a look at it. I still think there might be some merit to that suggestion I made several times back about some limitation on arbitration. Mr. Wellborn said you all hadn't had but one arbitration case in twenty years. That looks like a pretty good avenue to compromise the thing. Of course, I think if you don't use it, but once in twenty years you might as well leave it out but we might work out a compromise on it somewhere.

MR. COX:
On your limited arbitration you might have a case come up and use it and then, brother, you're out for the rest of the year. And I don't see how we can go on limited arbitration.

* * * *

[37] MR. GILLESPIE:
And when you get it up there it has got to be worked out. As a suggestion, not as a proposal again, if you're going to insist absolutely on arbitration suppose we set that up that any matter as to which both parties agree arbitration is necessary can be referred to arbitration.

MR. COX:
You had just as well leave it out if you're going to make it that way.

MR. GILLESPIE:
No, if we get into a grievance situation that we just can't work out between the International representatives and the

grievance committee and top management, and the arbitration is necessary at that time, I think both parties would agree to it at that time. I am afraid that you assume on grievances and things that we're going to be, that top management is going to be arbitrary, and we certainly don't want that assumed because we don't have any intention of being arbitrary about it.

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RESPONDENT'S EXHIBIT No. 18

[1] TRANSCRIPT OF PROCEEDINGS
CONTRACT NEGOTIATIONS

FANT MILLING COMPANY

versus

AMERICAN FEDERATION OF GRAIN MILLERS,
A. F. L.,
SHERMAN, TEXAS

SEPTEMBER 17th, A. D., 1954,
10:30 o'clock A. M.,

LAW OFFICES, Messrs. GILLESPIE & GILLESPIE,
Suite No. 210 — MERCHANTS & PLANTERS
BANK BUILDING.

[2] APPEARANCES:

Hon. O. B. FISHER, of Paris, Texas,
Messrs. GILLESPIE & GILLESPIE, of Sherman, Texas,
By Hon. CAMPBELL GILLESPIE,
Hon. V. I. MARTIN, Vice President, Fant Milling Company,

For the COMPANY.

Hon. ROY O. WELLBORN, Oklahoma City, Okla., International Vice President, American Federation of Grain Millers,

COMMITTEE:

Hon. H. L. DUNCAN,
ELMER WARREN,
V. U. HILLEY, and
JOHNNY WATSON, of Sherman, Texas,

For the UNION.

* * * *

[5] MR. FISHER:

Well, Mr. Gillespie, suppose, then, to save time, you tell Mr. Wellborn what is wrong with this proposal that he presents.

MR. GILLESPIE:

This (indicating) here of 4 or 5-pages, I cannot find any criticism until we get down to the bottom of the second page — I would like to find out a little bit about how it works.

MR. WELLBORN:
On the second page?

A VOICE:
Yes.

MR. GILLESPIE:
Yes. That is where you take off on that arbitration business and, for the first time in these negotiations, you bring out American Arbitration Association, or it is the first time that I recall. The Company has taken the position that on matters of griev-[6] ances and things of that kind that it is perfectly willing to? discuss any grievances introduced by a procedure that will take it right on up to Top Management; and you have pretty well — as a matter of fact, as far as I can tell, you followed word-for-word the other proposal —

* * * *

[32] MR. FISHER:
We had better get along on the Contract —

MR. WELLBORN:
That's correct. We are ready to agree to the Grievance Procedure as it is proposed at this time, which evidently is a Company proposal rather than one of arbitration issue. If you have got any other kind of an arbitration clause, we will say that we will go into it but, in the final analysis, we must have a means of final settlement by arbitration.

MR. FISHER:

Of course, Mr. Wellborn, we never have said that we won't agree to an arbitration clause but we do hesitate very much to even indicate that we would agree to an arbitration clause that was written so as to not be absolutely effective as an arbitration clause; and you know that it can be written, and I know that they can be written.

MR. WELLBORN:

Explain that a little bit further, will you? What do you mean by that?

[33] **MR. FISHER:**

By being ineffective?

MR. WELLBORN:

Yes.

MR. FISHER:

That is, set up Arbitration Procedure whereby the Union would name 2-men as Arbitrators, the Company would name 2-men as Arbitrators — ?

MR. WELLBORN:

Yes.

MR. FISHER:

(cont'd) — and any matter that was not otherwise agreed upon would be submitted to that Board of Arbitration composed of these two (2) representatives of Management and two (2) representatives of the Union?

MR. WELLBORN:

Yes.

MR. FISHER:

And that any decision made by these four (4) men as a Board would be final and binding on all parties?

MR. WELLBORN:

What happens if they don't make a decision?

MR. FISHER:

That is it. That is the reason that it is ineffective.

MR. WELLBORN:

Suppose that we arrive at a clause of that nature —

MR. FISHER:

Well, you have seen an arbitration agreement in the Contract.

MR. WELLBORN:

No; I am sorry. I never have. I have seen them to this, say, that in a case the Arbitra- [34] tion Board does not resolve the question under discussion; then, the Board will select the fifth impartial Arbitrator, which is a final settlement then.

MR. FISHER:

Well, you have seen them where they must agree upon that fifth Arbitrator — must be selected by them?

MR. WELLBORN:

That's right.

MR. FISHER:

And, then, they simply disagree on the fifth man, and it remains there until somebody decides to finish it — it is still uncertain and still not determined; and that sort of an Arbitration Clause I consider just completely ineffective to carry out; and you have simply, as a matter of fact, got something that is not workable and effective as an Arbitration Clause.

* * * *

[47] MR. FISHER:

Don't you think that, if we had an agreement on wages, in connection with all of the other paragraphs that we have agreed upon, that the employees might want us to wrap this thing up and get through with it?

MR. WELLBORN:

Are you furnishing to me an offer on wages that will be substantial enough?

MR. FISHER:

We have made an offer.

MR. WELLBORN:

You have made an offer?

MR. FISHER:

Oh, gosh, yes —

MR. WELLBORN:

Have not made offer on wages. We ask for a wage increase — I believe, the Committee did — some time ago — 15-cents an hour, wasn't it?

MR. FISHER:

That was just made — there has never been any serious objection that I have heard to the wage schedule set out in the Company's proposal.

MR. WELLBORN:

Yes; there are serious objections to it. I will enter that objection now. We want a general wage increase.

MR. FISHER:

Well, you have mentioned that, of course, every time it has come up but that has not been the thing that I have heard —

[48] MR. WELLBORN:

I think, request for wages is in the original letter to Mr. Honea, requesting negotiations on the Contract. I have not seen it for a year but I think, maybe, it is in there.

MR. GILLESPIE:

I don't think that I have got a copy of it.

MR. FISHER:

Some kind of understanding about necessary differential but I don't believe in such wage settlement and — we believe —

MR. WELLBORN:

Understand you do but we are interested in a general wage increase. If you are back to offering a general wage increase, we will be happy to discuss it this morning.

MR. FISHER:

We are certainly not set up here to offer the general wage increase asked for or suggested this morning but we are prepared to agree with you on the wages that have been set out and that are now being paid and all binding on the company, as is set forth in the proposal. That is to pay those wages.

MR. WELLBORN:

We are not satisfied with the general wages that are being paid now; we are not satisfied with the general wages that you put into effect here recently. We want a general wage increase to apply to all of the employees in the Plant.

MR. FISHER:

What is wrong with the adjustment? We sure didn't understand that there was any complaint [49] about that.

MR. WELLBORN:

I didn't know that we ever agreed on any adjustments. I understand that you put some into effect.

MR. FISHER:

We put some into effect after it was suggested or discussed up here.

MR. WELLBORN:

Was the amount that you put into effect suggested?

MR. FISHER:
No.

MR. WELLBORN:
Or did you just arbitrarily put them into effect?

MR. FISHER:
Well, I think the Superintendent —

MR. WELLBORN:
And Mr. Fant —

MR. FISHER:
The amount was suggested — that there should be certain differentials between certain employees but didn't —

MR. WELLBORN:
Back to our notes —

MR. FISHER:
I cannot remember right now whether it was a nickel or whether it was 4-cents or whether it was 6-cents but I know that it was discussed.

MR. HILLEY:
We got a nickel and —

MR. WELLBORN:
Most of it —

MR. HILLEY:
Those, I think, got 2 or 3-cents more.

MR. FISHER:
Do you recall whether or not it was suggested that there ought to be at least that much separa- [50] tion between them?

MR. HILLEY:
It was suggested that there should be some differential but I don't think any set amount arrived at.

MR. GILLESPIE:
I thought that we suggested some changes in here for separation. I may be wrong, I could not tell you.

MR. HILLEY:
When this proposal was put out, Batch Mixer draws $1.41 and a Packer, I believe, $1.38. I think, I got 2-cents —

MR. FISHER:
What should be the differential between them?

MR. HILLEY:
I wouldn't want that — this deal — no; I am strongly against any of that —

MR. WELLBORN:
I think this is the wrong time to discuss this. We will get to that when we get on wages.

MR. HILLEY:
There is a difference there.

MR. GILLESPIE:
We are particularly interested in that because, if there is any inequity in the Plant, we want to correct it.

MR. WELLBORN:
The only way we can do that is to actually get down to an analysis in the classifications in the Plant, that a classification carries so much —

MR. GILLESPIE:
I don't believe that you were here at the meeting where we had that discussion.

[51] MR. WELLBORN:
No; I was not.

MR. GILLESPIE:
As we made our proposal which included a wage schedule in it so that it would be complete.

MR. FISHER:
Let me get this one thing. We have been talking over an hour. Does the Union feel that the Huller and Batch Mixer in the Feed Department should get the same?

MR. WELLBORN:
I don't know yet.

MR. FISHER:
Same -?

MR. WELLBORN:
We have not gone into wages; we will discuss those when

we get to the various classifications and, until then, I don't feel that it is necessary. We have got several issues under the copy of the Contract that we have not agreed upon. In fact, they are very few that we have agreed upon. We would prefer to arrive at an agreement including all of the issues covered by the Contract; and, then, we will be happy to discuss the wage schedules but it seems a waste of time to suggest wage schedule when we have so many differences of opinion on the other issues that the union has asked to be negotiated in the Contract.

MR. FISHER:

There are not too many differences and say that it is not an opinion. On our arbitration now, that issue, there is no difference in the Grievances [52] Procedure except arbitration.

MR. WELLBORN:

Arbitration for the Company — we want a Grievance Procedure in our Contract.

MR. FISHER:

That will be No. 1. Now, on Seniority Board, there has been some difference of opinion — that's No. 2. Now, what else? I am not looking at any notes —

MR. GILLESPIE:

We never have worked out the liquidated damages —

MR. FISHER:

That is in disagreement on that because no penalty provision or, if one is accepted, don't want the penalty provision as provided in the proposal.

MR. WELLBORN:

You have been bothering me for ninety (90%) per cent — for the last year and a half. I think that the Federal Law provides your damage procedure in case we walk out on an illegal strike. I don't know why you want anything more. You are good attorneys. You evidently enjoy practicing your profession —

MR. FISHER:

That's obvious because we insist on that —

MR. WELLBORN:

The Federal Law provides actual procedures for damages.

MR. GILLESPIE:

The Federal Law says there won't be any legal strike —

MR. WELLBORN:

When we arrive at an agreement [53] that is acceptable — we will be happy to — at these others. We don't want any illegal strikes. We are law abiding citizens.

MR. FISHER:

That is just something that we are not in agreement on. That will be No. 3. Now, wages makes No. 4.

MR. GILLESPIE:

I think that wages are very material for the Contract.

MR. FISHER:

The Contract wages — that is right important.

MR. WELLBORN:

It is very important for our members also.

MR. FISHER:

No, sir; and you have not really expected it.

MR. WELLBORN:

I won't agree on that. We have discussed what we wish should be done.

MR. GILLESPIE:

I thought that we had that worked out.

MR. FISHER:

I think so.

MR. WELLBORN:

Would you agree and include overtime? That is really the thing. It is on an average for 40-hours?

MR. FISHER:

Yes, sir.

MR. WELLBORN:

I will agree on conditions of overtime when the Union has asked for time-and-a-half after [54] 8-hours in any one day.

MR. GILLESPIE:

I thought that we wanted to work that out.

MR. WELLBORN:

We do not. We don't agree on any set day in work week when the Union requested that a clause be put into the Contract covering that no set work week —

MR. GILLESPIE:

I thought that we had discussed that.

MR. WELLBORN:

We have not agreed on the differentials, however, Mr. Gillespie said that he didn't think anything very wrong; I said, "No; wanted to sign Contract"; he said that we should ask for a very nominal amount; and have not agreed on double time on Sundays but we have agreed on the Holidays; we won't agree to the payment for Holidays at straight time if not work on double time in the week; we have not agreed that when a Holiday is paid for, that 8-hours, that wage, would, then, merit computing overtime after 4-hours, which is the customary Holiday time grade; we won't agree to that regarding pay rendered; the Union asked 4-hours; the Company has offered nothing actually; I don't think that they offered anything on that.

MR. FISHER:

Yes; I thought that we had tentatively agreed on that.

[55] **MR. WELLBORN:**

We have not agreed.

MR. FISHER:

It was my understanding that it was not binding on anybody until it was carried into the Contract.

MR. WELLBORN:

And the Contract is not guaranteeing that when they are called back for four (4) hours that the Union has asked for. We have not agreed on a guaranteed ordinary call which the Union has asked for.

MR. FISHER:

Those things have all been compromised.

MR. WELLBORN:

We have not agreed on jury pay, which the Union asked for; we have not agreed on Seniority.

MR. FISHER:

How do you want jury pay?

MR. WELLBORN:

As we proposed it in our proposal. We have not agreed on posting jobs when a vacancy occurs, which is a part of the Seniority.

MR. FISHER:

Being a part of Seniority — ?

MR. WELLBORN:

We have not agreed on probationary employees. We have not agreed on rates for temporary transfers. We have not agreed on certain conditions. We have not agreed on vacations.

MR. FISHER:

I thought that all of those —

MR. WELLBORN:

We have not agreed on Grievance Procedure because arbitration is a part of the Grievance [56] Procedure. We have not agreed on strikes and lockouts. We have not agreed on the clause covering working conditions in the Plant. We have agreed on a Bulletin Board. We have not agreed on —

MR. FISHER:

I take full credit for that.

MR. WELLBORN:

We have not agreed on employees who are injured on the job. We have not agreed on wages. We have not agreed on adjustments. We have not agreed on the term of the Contract. We have been over a lot of things but we have not agreed on them.

* * * *

[79] **MR. FISHER:**

Let me find out one thing, please, for my own thinking. In view of all of the discussion that we have had, do you still insist on your original Proposal as it is written?

MR. WELLBORN:

No.

MR. FISHER:

I thank you. That is what I wanted to hear.

MR. WELLBORN:

We didn't expect to get it when we asked for it.

* * * *

[80] **MR. GILLESPIE:**

We have worked like thunder on this, trying to work out a Contract here with you and, then, after we thought that we had worked out something, now, you take the position that you knew that you would not get it all at the time that you asked for it.

MR. WELLBORN:

For instance, discussed the Vacation Clause in no way; there is no understanding as to whether you will give us two (2) weeks off or three (3) weeks. After talking to you here I got the indication that you would, at least, go along for 2-weeks after three (3) years —

MR. GILLESPIE:

That does not agree with my recollection or notes on that vacation business. My notes here (indicating) say we told you that we would endeavor to continue the present vacation policy, and that we would keep on discussing it with reference to your proposal since we didn't agree to your proposal on vacations —

MR. WELLBORN:

That's right and we discussed it [81] here on different times — two (2) different times — supposed to discuss it —

MR. GILLESPIE:

We finally got around to discussing it and we didn't agree to it.

MR. WELLBORN:

That is why I got the very definite impression at that time that we had not agreed. We are getting, I understand, about a week's vacation now on some of the people; and we have got two (2) weeks out of the Plants and three (3) weeks in most all of them. Now, we would certainly be willing to withdraw the request on the three (3) weeks if they agreed to a two (2) weeks vacation.

MR. GILLESPIE:

We have not felt that we were in a position to go along on two (2) weeks.

MR. WELLBORN:

In addition to that, you have not even agreed to put one week in the Contract. You say, you wished to continue it but you won't put it in the Contract.

MR. GILLESPIE:

We will put it in the Contract that we will do our best to continue paying it.

MR. WELLBORN:

That is the point and it is the same as not putting it in the Contract.

* * * *

[90] MR. WELLBORN:

I will tell you this right frankly. If you people are sincere in your efforts to arrive at an agreement here, you will give some consideration to some of the questions that are very essential in a Union Contract; and I think that we can sit down here and make some progress.

MR. GILLESPIE:

Now, that works the other way, too. If you are sincerely interested in arriving at a Contract and will give consideration to these proposals which I think are necessary from the Company's standpoint, [91] I think you will get that contract. That can work around both ways; it is going to have to be worked on hard; that is what I have been preaching here now for six (6) months, trying to work out some compromise —

MR. WELLBORN:

We are willing to compromise but we don't want that one way track on that thing.

MR. GILLESPIE:

Neither do we and there are several things in there apparently that it is going to be very difficult, apparently, to work out a compromise on.

MR. WELLBORN:

Well, it appears that way; yes.

MR. GILLESPIE:

But the law does not require and the Company does not propose to do all of the giving. I know what you want in the way of a Contract and you remember, we have given everything and you have not given anything. You put it the other way but I am serious about that. We are not going to do all of the giving. Well, we had thought that we had gone a good ways on getting this started but after you started reading that off it don't look that way; it don't look like our Contract in there; but we will get together and go back up there and give you careful consideration —

MR. WELLBORN:

Unfortunately, the Union, or your employees, who are Members of the Union, they don't have anything to give; and they would like to have a Contract [92] that will cover the conditions of their labor.

MR. GILLESPIE:

Of course, we will still try to get to this pay part — that's not what we are talking about. I am talking about going to make a compromise on this Contract. We have not asked anything of you people for the Shop or Mill, and we don't propose to do that.

MR. FISHER:

I suggest what we should do about this; you and I will go over this during the next few days, as soon as we are back out of court; I am really in court and you are, too, on Monday and I believe that it is Monday that you are in court?

MR. GILLESPIE:

I have a case on Monday morning in court but I have Motions set up in Dallas now.

MR. FISHER:

Well, then, let's get hold of Mr. Wellborn —

MR. WELLBORN:

I would prefer to set up a date now, if possible.

MR. FISHER:

And we can get him back down here.

MR. GILLESPIE:
I am tied up in court next week.

MR. WELLBORN:
I will be out at Los Angeles from the 19th to the 27th or 26th; I will be back on the 26th; I am committed for all of that time; when you people are ready, we will sit down here and wrap this thing up; it is going to take more than one day —

[93] (DISCUSSION ABOUT FUTURE DATES OMITTED)

MR. GILLESPIE:
Let's make it the 12th.

MR. WELLBORN:
The 10th.

MR. GILLESPIE:
The 10th is all right with me.

MR. WELLBORN:
Let's make it the 10th. I don't think that I will be here.

(FURTHER DISCUSSION OUT OF RECORD)

MR. WELLBORN:
That's a month, isn't it?

MR. GILLESPIE:
Not quite. September is a short month, anyway. That's all. We will adjourn.

(ADJOURNMENT)

* * * *

RESPONDENT'S EXHIBIT No. 19

[1] FANT MILLING COMPANY —
UNION NEGOTIATIONS
SHERMAN, TEXAS, ROOM 210 M & P BANK BUILDING

October 15, 1954

APPEARANCES:

FOR MANAGEMENT:
Messrs. V. I. MARTIN, C. H. GILLESPIE, JR. and O. B. FISHER. (Mr. HONEA not present)

FOR THE UNION:
Mr. ROY WELBORNE, for the International

(No committee members present)

(1:30 p.m. Mr. WELBORNE came in) (Mr. WELBORNE went after his committee, leaving office. Mr. WELBORNE came in alone, none of the committee with him, 1:55 p.m.)

2:00 P.M.

MR. WELBORNE:
I don't know what happened to that committee unless they forgot about it.

* * * *

[2] MR. FISHER:
A wage increase has been put into effect, which should certainly eliminate the wage question.

MR. WELBORNE:
Who was this wage increase negotiated with?

MR. FISHER:
The wage increase was put into effect by the [3] Company following our last meeting.

MR. WELBORNE:
What date was it put into effect?

MR. FISHER:
I can't give you that information.

MR. WELBORNE:
Was it October 4?

MR. FISHER:
I don't know.

MR. GILLESPIE:
I believe it was announced October 6. I don't know what the effective date was. I believe the effective date was October 4, wasn't it, Mr. MARTIN?

MR. MARTIN:
That is correct.

MR. WELBORNE:
How much was it? I think it was seven (7c) cents across

the board, wasn't it? Was that all of the people, a general wage increase? You see, we want to know those things.

MR. GILLESPIE:

We tried to get you to talk about wages increase last meeting, you would not talk about it then.

MR. GILLESPIE:

My recollection is you said you were not ready to talk about wages.

MR. WELBORNE:

I thought we asked for fifteen (15c) cents an hour.

MR. GILLESPIE:

I believe there was something said about fifteen (15c) cents an hour.

MR. MARTIN:

Yes. That covered everybody, Roy, straight on down with the exception of the supervisory, monthly and semi-monthly paid employees. [4] All hourly paid employees received seven (7c) cents an hour.

SENIORITY, GRIEVANCE, AND ARBITRATION

MR. WELBORNE:

On this last proposal the Union proposed on Seniority and Grievance and Arbitration; does the Company have any further objections to those proposals?

MR. GILLESPIE:

Down to a point the Company has no objections, but beyond that point it is not willing to accept it, that is the point it takes off of arbitration.

MR. WELBORNE:

You are surely not in position to refuse to agree to arbitration procedure, are you?

MR. GILLESPIE:

We will refuse to agree to an arbitration procedure at this time, yes, sir.

MR. WELBORNE:

I was certainly in hopes you were in position where we could negotiate a contract.

MR. GILLESPIE:

We are ready, willing and able to negotiate a contract. We don't want an arbitration clause in it though.

MR. WELBORNE:

The only way I could justify leaving out an arbitration clause would be to leave out a no-strike clause. Would the Company be willing to do that?

MR. GILLESPIE:

The Company does not see a particular point in having a contract without a "no-strike" clause. [5] That is one of the things that the Company is particularly interested in in the contract.

* * * *

[8] MR. WELBORNE:

Would the Company be in position to get me, supply me with a list of the employees, their classification and their wage rates and the date of their employment?

MR. GILLESPIE:

I don't believe we have that data in that form.

MR. WELBORNE:

I would like to have a list of the employees, [9] each employee's name and their wage rates, their present rates.

MR. FISHER:

I think that can be provided.

MR. WELBORNE:

And the date they started work for the Company. That is necessary —

MR. FISHER:

I don't know about the date but could give the best information available.

MR. WELBORNE:

I think you can get the information.

MR. FISHER:

We could with some reasonable certainty, maybe, not the exact date. I will make a note of that.

MR. WELBORNE:

It would almost be necessary for us to have that in order to explain a contract to the membership. (Mr. FISHER hands note to GILLESPIE)

MR. FISHER:
Why did you want that information, Mr. WELBORNE?

MR. WELBORNE:
Pardon?

MR. FISHER:
Why do you want that information as to your separate employees, wage rates?

MR. WELBORNE:
It is almost necessary for us to have it to discuss with the employees, his wage rates and his classifications and what his responsibilities are under those. Actually, it is necessary information that we have in order to actually set down and negotiate a contract.

MR. FISHER:
You have no objection to the present wage rates?

[10] MR. WELBORNE:
I would certainly have objection to the Company putting in a wage increase down there without negotiating it through the Union.

MR. FISHER:
Do you have objection to the wages having been increased?

MR. WELBORNE:
I did not quite get that one clear.

MR. FISHER:

It was intended to be clear. Do you have any objection to the increases that have been granted the employees?

MR. WELBORNE:

I certainly have objections to the way the increase was put into effect.

MR. FISHER:

Do you want it taken off?

MR. WELBORNE:

Do I want it taken off? Would you take it off? If I have objection to it being taken off?

MR. FISHER:

What I want to know: Do you have objection to it coming off?

MR. WELBORNE:

Your company put it into effect without discussing it with the Union. You could have shown us the courtesy of discussing it with us.

MR. FISHER:

We have negotiated it for months.

MR. WELBORNE:

We have?

MR. FISHER:

We have attempted to negotiate wages.

MR. WELBORNE:

We certainly did not have notice a wage increase was going to be put into effect. There was not any notice to the bargaining representatives. The Company unilaterally put the [11] wage increase into effect.

MR. FISHER:

You certainly would not say you wanted it rescinded?

MR. WELBORNE:

No. I would not say that at all. We want the people to get all the wages and all the Company can afford to pay them.

MR. GILLESPIE:

And you don't deny on the 27th day of August — no, the 17th of September, we asked you to discuss wages and you said you were not ready to talk about them at that time?

MR. WELBORNE:

A little further we said we would discuss them on the basis of fifteen (15c) an hour, a general wage increase. I actually would like to set down and negotiate a contract with those people.

* * * *

[14] MR. WELBORNE: . . .

* * * *

When do you suppose you could get me a list of the employees and the other information I asked for?

MR. GILLESPIE:

That depends on how deep we have to dig in those records. We don't have it in that shape. We will have to put it together.

MR. FISHER:

The committee ought to have full information on that subject, that is, in a general way.

MR. WELBORNE:

In a general way they have general information, they don't have accurate information that we should have.

MR. GILLESPIE:

I would think you would have it in more accurate form on your membership cards than we have. Maybe you don't get that information from the employees.

[15] MR. WELBORNE:

That does not carry the necessary information. You have got a great many people down there, do you know when they went to work for the Company?

MR. GILLESPIE:

You have got a lot of people the Company don't know when they went to work for them.

MR. WELBORNE:

There ought to be records that they could refer to.

MR. GILLESPIE:

I don't think they keep those records more than two or three years, you would have to go back and search through the payrolls to find it. Do you remember how long they keep payrolls, V. I.?

MR. MARTIN:
Campbell, under Federal law you have records to 1936.

MR. GILLESPIE:
I thought those could be disposed of in three years.

MR. MARTIN:
No, sir, Social Security records must be kept indefinitely, forever.

* * * *

[17] MR. WELBORNE:
I don't know what happened to that committee. I thought maybe you guys gave them seven (7c) an hour not to show up.

* * * *

[18] MR. WELBORNE:
Why don't you make arrangements with Mr. Fant to have him come up here and sit on the negotiations?

MR. FISHER:
He is trying to operate that business down there, keep it going, in order to pay the employees and the attorneys.

MR. WELBORNE:

I believe he is a much fairer minded man than his legal advisors.

MR. FISHER:

I doubt that. I am one of his legal advisors. We are not in position to make the admission anyway.

MR. WELBORNE:

I don't think he would be so suspicious of a labor representative.

MR. FISHER:

I don't believe he would be suspicious.

MR. WELBORNE:

After all, we are not trying to put a noose around your neck.

MR. FISHER:

He does not want to turn the plant over to you.

MR. WELBORNE:

We don't want it.

MR. FISHER:

Anything short of that.

MR. WELBORNE:

We certainly don't want that responsibility.

MR. FISHER:

Anything short of that he'd be willing to sign.

MR. GILLESPIE:

I have seen a day or two he would be willing to turn it over to you.

MR. WELBORNE:

I would not be a bit surprised. Why don't you write a new proposal incorporating all of the requests we have made here?

MR. GILLESPIE:

If you will limit that to requests we have approved, it would not have to be quite so long a re-write.

MR. WELBORNE:

That would certainly be an improvement over the last proposal you made.

MR. FISHER:

We will add a seven (7c) cent an hour, that is a very substantial improvement.

MR. WELBORNE:

Tell me this: If the Company really intended — wanted to negotiate (I will strike "wanted") if they intended to negotiate with the Union in good faith why did not you at least talk to the committee about this 7c rather than unilaterally putting it into effect and announcing it?

MR. GILLESPIE:

We tried to talk to you and the committee about it right up here in negotiating session.

MR. WELBORNE:
You certainly did not offer anything.

MR. GILLESPIE:
We certainly wanted to discuss wages.

MR. WELBORNE:
We are ready now.

MR. GILLESPIE:
You said you would take 15c an hour across [20] the board. We did not take that seriously.

MR. WELBORNE:
You didn't? We were serious on it.

MR. FISHER:
It is not fair to the Company or employees either to withhold a wage increase pending disposition of a controversy over arbitration and attitude of the Union negotiator, if he wanted to dispose of those issues, that is, we understood that, then the other issues, talk about wages.

MR. WELBORNE:
We wanted to negotiate a contract which included all proposals.

MR. GILLESPIE:
If you will make a formal demand we withdraw that wage increase we will consider it.

MR. WELBORNE:
Would you be willing to do that?

MR. GILLESPIE:
We will consider it.

MR. WELBORNE:
Will you withdraw the wage increase if I demand it?

MR. GILLESPIE:
We would have to check further with some of the other members of management, but if you will give us a formal demand we will certainly consider it.

MR. WELBORNE:
Here is a vice president. Maybe he can answer that.

MR. MARTIN:
No. I can't answer that. My details are not that dirty.

MR. WELBORNE:
You mean it is not in the high finance? It [21] certainly is not our policy to take money away from our people. We are trying to get more money for them.

MR. GILLESPIE:
How does our proposal compare with other places of employment in Sherman as far as wages are concerned?

MR. WELBORNE:
As far as wages are concerned I would say it is in pretty good shape. ~~I think~~ your policy has been to keep it that way. If I remember correctly, usually some other places you put in a wage increase, you put them in right after or before. But the benefits you are willing to give your people — do give your people, you are not willing to put them in-

to the form of a contract guaranteeing to those people for any period of time, you want the right to take it away from them any time you desire.

MR. FISHER:

I don't think that is justified, Mr. WELBORNE. It has been stated — we are authorized and desired to change the proposal so as to include the increase in wages.

* * * *

[24] SENIORITY.

MR. WELBORNE:

Do you propose, Mr. FISHER, to re-write your seniority proposal that the Union submitted?

MR. FISHER:

I know of no occasion right now to re-write it, Mr. WELBORNE. If you will refer back to our last proposal (I don't recall just when it was written) and it was just before you submitted this proposal, or maybe months before, or sometime before. If you desire we will certainly go over it and re-write it so as to make a proposal if there is any additional thought that has been agreed upon in connection with it. I would have to look at the notes to see, but there is no objection to re-writing our proposal and adding anything —

* * * *

[27] MR. FISHER:

I will sit down and re-write that sometime between now and the next meeting and get you to put them together on one piece of paper.

* * * *

[29] MR. FISHER:

I will re-write it so as to include every clause that has been agreed upon to my knowledge and so as to include such other qualities as the Company is willing to agree upon.

* * * *

[30] (OFF THE RECORD)

(Following a discussion, it was tentatively agreed that the meeting would be adjourned until October the 30th at 9:30 A.M.)

* * * *

RESPONDENT'S EXHIBIT No. 20

[1] FANT MILLING COMPANY-UNION CONTRACT NEGOTIATIONS HEARING, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS AND PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 19TH DAY OF NOVEMBER, A. D. 1954.

APPEARANCES:

FANT MILLING COMPANY REPRESENTATIVES:
Mr. C. H. Gillespie, Jr., Attorney.
Mr. O. B. Fisher, Attorney.
Mr. V. I. Martin.
Mr. Fred Honea.

UNION REPRESENTATIVES:
Mr. Roy Wellborn.
Mr. Roy Rolen.

MR. GILLESPIE:
Mr. Wellborn, do you want to wait on any other members of your committee?

MR. WELLBORN:
No, I instructed them those scheduled to work to go ahead and work, and those not scheduled to be here, and I don't know whether they are going to come or not. Mr. Rolen said three or four of them was [2] supposed to come, but maybe they had them busy.

MR. GILLESPIE:
I don't know about that, but as far as I know the mill is operating.

MR. WELLBORN:
You hope so.

MR. GILLESPIE:
I hope so.

MR. WELLBORN:

We'll go ahead, and when they come, we'll bring them up to date.

MR. GILLESPIE:

Well, my recollection is that at the last meeting you suggested that we go back over this situation pretty thoroughly, and we have done that. We have had several conferences, Mr. Fisher and myself, Mr. Martin, Mr. Honea and Mr. Fant. We have actually been negotiating here for well over a year, about fifteen months, and the last few months it has been fairly apparent that the attitude of the union was going to be that they weren't interested in negotiating a contract, that they — whenever we make a suggestion, why you go right back to your original proposal, which seems to us that the union is not particularly interested in a contract, unless it is one they can dictate. In addition to that, we have had information from what the mill considers to be accurate, reliable sources, that you don't have a majority of the employees, that you don't represent a majority of the employees any more, and that the majority of the employees would prefer not to be represented by your union. So on that basis, Mr. Wellborn, we have reached the [3] conclusion that we wouldn't negotiate any further on this.

MR. WELLBORN:

Well, I might say this is certainly not surprising, but it is the usual procedure followed with a company like yours. We have certainly been trying here for a period of better than a year to negotiate a contract that would be fair to the employees and we certainly have not had any indications from the company that they was willing to negotiate in good faith on a contract at all, other than a contract which would be meaningless. We are quite familiar with the pattern that you have established here. Actually this comes as no surprise that you think we do not represent a majority of the people. However, we think we do. We would like to go ahead and negotiate a contract that would be acceptable and satisfactory to both the employees and the company, and we are prepared to do so.

MR. GILLESPIE:

Now, we, of course, don't agree with all of your statement. We recognize your right to make it, and don't want to quarrel with you about it, but we take the position that the company has bargained for well over a year in absolute good faith, and we have made any number of proposals and changes in our proposals. There are several things that the company has insisted on having in the contract. Several things we have declined, but all of those things we think are well within the rights of the company. And we have made you several proposals of complete contracts, [4] and there has been no indication that you are willing to accept even a substantial part of them, and we take the position that we have bargained with you in good faith and tried to arrive at a contract that would be satisfactory to both parties.

MR. WELLBORN:

Actually any proposals that the company has proposed to the union, there hasn't been anything in them.

MR. GILLESPIE:

Well, they will have to speak for themselves.

MR. WELLBORN:

Of material value to a union at all. You offer nothing in the contracts that you proposed which the union has asked for, other than the bare necessities to call it a contract. You have not proposed to incorporate any of the clauses that are generally recognized as part of a labor contract in your proposals. You have refused to recognize your employees' rights to ask contractual protection for their jobs and contracts of security on the job. You have steadily maintained your right to run the company, which we recognize, and your right to discharge an employee for any reason, which we don't recognize. There are certain rights that your people want and are entitled to, and we think they should be in a contract. We think your company should willingly put them in a contract.

MR. FISHER:

Mr. Wellborn, the important [5] thing, so far as the company is concerned, and I think the union, too, is that the company, for over a year, recognized your union as the bargaining representative of the employees, and did so because — in fact, it was for a time at least the bargaining representative of the employees and the exclusive bargaining representative.

MR. WELLBORN:

That is correct.

MR. FISHER:

That was recognized and it having been established that the union was the exclusive bargaining agent, why, such fact was recognized, the company has sought for this period of time to obtain a contract. Now, in the meantime it has developed to the satisfaction of the company that the employees don't want the union to represent them, so that makes it impossible from the company's standpoint for the company to further recognize the union as the bargaining agent, so we just simply at this time do not recognize the union as the bargaining agent for the employees at the plant.

MR. WELLBORN:

Naturally I don't know what method you have used to ascertain your belief that we do not represent a majority of the employees. We think we do. They still want a contract. We still want to negotiate a contract for them. They have certainly given us no indication whatever that they didn't want us to represent them.

MR. FISHER:

Well, have you given them [6] an opportunity to give you the information?

MR. WELLBORN:

I think the information is always there, yes.

MR. FISHER:

Well, the company did not seek the information originally, but the information came to the company without it being sought, but, of course, the employees did have an opportunity to express themselves. Otherwise, the information —

MR. WELLBORN:

Do you mind telling what source of information you have?

MR. FISHER:

Just by word of mouth.

MR. WELLBORN:

You actually don't have any facts?

MR. FISHER:

Yes, we do have facts, but we do not have any documentary evidence.

MR. WELLBORN:

You mean to tell me that a majority of the employees have told you by word of mouth that they didn't want the union to represent them?

MR. FISHER:

I mean that the company has the information that a majority of the employees have said that they do not want the union to represent them.

MR. WELLBORN:

Well, we think —

MR. FISHER:

So that is a question that has to be determined before we can go further.

MR. WELLBORN:

We think the question has [7] already been determined and satisfactorily as far as we are concerned. We recognize, Mr. Fisher, that this is just a usual procedure in your pattern of dealing with labor unions. This isn't the first time it has happened. We know your record as well as you do, and that is why I say it is certainly not surprising that this request has been made, or the statement has been made.

MR. FISHER:

If Fant Milling Company has a record, I am not familiar with it. If they have any record with your union.

MR. WELLBORN:

Well, I take it from your statements that you are refusing to bargain any further?

MR. FISHER:

That is correct, sir, and do not recognize the union as the bargaining agent of the employees at this time.

MR. WELLBORN:

Well, I guess that —

MR. FISHER:

If there comes a time when you do represent the employees, we'll certainly be delighted to make a contract.

MR. WELLBORN:

We think we represent the employees now.

MR. FISHER:

Well, I can understand your thinking on that.

MR. WELLBORN:

And in view of the certification issued by the Board, we don't think it is [8] necessary to again show the company that we represent a majority of the employees.

MR. FISHER:

Since the company has the definite information that you do not, why, you are simply not recognized as the bargaining agent.

MR. WELLBORN:

Therefore, you are refusing to bargain any further?

MR. FISHER:

Yes.

* * * *

COPY

RESPONDENT'S EXHIBIT No. 22

October 6, 1954

PAY BULLETIN

It is herewith announced that effective with Monday, October 4, 1954, hourly wages in the Sherman and Gainesville flour mill, Sherman and Gainesville elevators and the Sherman feed mill are advanced 7c per hour.

(Signed) Jas. A. Fant
President.

(Signed) Ben Blackburn
Superintendent.

[File endorsement omitted.] 479

In the United States Court of Appeals for the Fifth Circuit 480

No. 16,953

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY, RESPONDENT

Appendix to Respondent's Brief

Filed April 5, 1958

[95] ROY O. WELLBORN—DIRECT EXAMINATION

Mr. **FISHER.** That must account for my hesitancy in making that statement because I did have some hesitancy about it.

Then, Your Honor, I would like to state clearly, if I can, what I am trying to say, and that is that the charge alleges that the company on or about November 20, 1953, refused to bargain collectively; that such refusal constituted an unfair labor practice; and that on the date of the filing of the complaint, May 20, 1954, the company was engaging in an unfair labor practice, namely, or refusing to bargain since we looked 481 to the printed part of the form. There is no other charge in the charge against this company that we have heard the Examiner's remark with reference to setting in motion the machinery of the Board, but we do want to call attention to our objection to all testimony either before those dates or after those dates, because it is not within the contemplation of the charge.

TRIAL EXAMINER. I think you are pretty well protected on the record in that respect, Mr. Fisher.

Mr. **FISHER.** All right, I hope so.

* * * * *

[151] RALPH COX—DIRECT EXAMINATION

Mr. **THOMPSON.** The position of the General Counsel is again that if we had certain specific acts that had been alleged as a refusal to bargain in and of themselves and just get these various meetings, but we don't have such a situation here, at least in our opinion. There is one act which we are coming to at the end of the negotiations which we consider to be in and of itself a refusal to bargain, but until then we don't have any one act that we feel is in and of itself a violation of 8(a)(5), but we do feel that the entire bargaining constitutes surface bargaining, bargaining not in good faith and therefore a violation of 8(a)(5).

* * * * *

482 [275] ROY O. WELLBORN—DIRECT EXAMINATION

By Mr. Thompson:

Q. All right. Your attention is directed to the meeting of October 15, the date which we have stipulated, and we have also stipulated that you were present at that meeting.

Was there a discussion concerning wages at that meeting, Mr. Wellborn?

A. Yes, sir.

Q. What did the company say about wages?

A. The company informed me that they had put a seven-cent an hour wage increase into effect.

Q. Did they tell you when they would put it into effect?

A. Yes, on October 4.

Q. Did you have knowledge of this increase prior to this meeting?

A. I did.

Q. Would you tell me as well as you can remember how and when [276] you found out about this wage increase?

A. I had a meeting with Quaker Oats Company on October 5. I came in from East Texas for this meeting and I was informed, when I came into this meeting, that Fant Milling Company had the day before put a wage increase into effect.

Trial Examiner. When was this?

By Mr. Thompson:

Q. Is that Quaker Oats here in Sherman?

A. That's right.

483

Trial Examiner. When was this, what was the date?

The Witness. The date was October 5 when I first became aware that the company had put the wage increase into effect on October 4.

By Mr. Thompson:

Q. Who told you at Quaker Oats? Who was the person with whom you were speaking?

A. I believe the first one that told me was Bill Henderson, the president of the union at that time.

Q. Anyone else at Quaker Oats mention it to you?

A. There was several of them mentioned it to me after that.

Q. Did you attempt to find out anything from the Fant Milling Company itself?

A. I did. Frankly, I didn't believe it. I got in my car and went down to Fant Milling Company and went into the cafeteria and contacted Mr. Martin who was in there drinking coffee.

Q. Who was Mr. Martin?

A. Mr. Martin is the vice president of Fant Milling Company, I [277] understand.

Q. Is he in the courtroom today?

A. Yes, he is.

Q. Is he the gentleman over there?

A. Yes, sir, the good-looking one.

Q. All right. What did you say to Mr. Martin?

A. I told Mr. Martin that I had heard that the company had put a wage increase into effect the day before and asked him what the amount was.

Q. What did Mr. Martin say to you? 484

A. He told me that they had put a seven-cent an hour wage increase into effect the day before.

Q. What else if anything did you say to Mr. Martin?

A. We went ahead and talked about something, we had some more discussion. I asked him why, and he said he didn't know, or something to that effect.

Q. I see. That was the first time you had heard about the wage increase from the company?

A. That day, yes.

Q. From the company?

A. Yes.

Q. By the company, I mean the Fant Milling Company.

A. That's right.

* * * * *

[293] ROY O. WELLBORN—CROSS EXAMINATION

A. When did I first know of Fant Milling Company?

By Mr. FISHER:

Q. Yes, sir.

A. Oh, it was possibly seven or eight years ago.

* * * * *

[294] By Mr. FISHER:

Q. Well, how did it come about that you were negotiating a contract with him at that time?

Mr. THOMPSON. I renew my objection to the question, Mr. Examiner.

TRIAL EXAMINER. Overruled.

A. I was sent in here to negotiate a contract for the employees of Fant Milling Company.

By Mr. FISHER:

Q. And by whom were you sent?

A. By my international union.

Q. And that is this same union that you represent at this time?

A. That's correct.

* * * * *

[295] By Mr. FISHER:

Q. You and Mr. Fant were not in disagreement as to contract provisions, were you?

A. Yes, on final summation of the agreement that we arrived at or the various agreements that we arrived at, I was never able to get Mr. Fant to agree to put a vacation in that contract.

Q. Sir?

A. I was never able to get Mr. Fant to put a vacation in that [296] contract.

By Mr. **Fisher**:

Q. I see, sir. Otherwise, you and he were in agreement?

A. I believe that's about the only thing we were apart on, yes.

Q. All right, sir. Now, a contract was not signed, was it?

A. No, it was not.

* * * * *

[297] By Mr. **Fisher**:

Q. Mr. Wellborn, please state frankly if it is not a fact that you found that the employees did not want you to represent them and that you abandoned your contract.

A. No, I can't exactly state that as a fact. I can tell in my own words what happened if you want me to, and I don't have any hesitancy about doing it.

Q. I think we are entitled to have an answer to the question, but we will invite you to tell us in your own words. 486

A. If you will rephrase the question so I will know how to answer it * * *

Q. Just state what you had in your mind when you said you would tell in your own words what happened.

A. We was never able to get Mr. Fant to agree to a vacation in the contract and it drug on for some time, I don't know how long, and the people, I suppose, got discouraged not getting to a contract, so the last time I called a meeting, they never did come up there. So I never did fool with it any more, so that's exactly what happened.

* * * * *

[298] By Mr. **Fisher**:

Q. When you say that people didn't come up, you mean the employees of the company didn't come up and show any interest in your union, do you not?

A. They didn't attend that meeting and I took it for granted that they didn't have any interest, so I didn't waste any more time on it.

Q. All right, sir.

A. If that's what you want, that's actually what happened.

* * * * *

[378] Roy O. Wellborn (Cross Examination—Cont.)

Trial Examiner. With regard to that, did you find any clause in there that the union gave up on, withdrew, abandoned?

The Witness. We find on the check-off, we agreed to withdraw if the company wanted us to. In other words, it didn't make any difference to us whether they did or not, but other than that, all of them are necessary clauses, all of them that we discussed. 487

By **Mr. Fisher:**

Q. You now state to the Examiner you abandoned the check-off?

A. I stated we would if the company desired.

Q. When did you make that statement and where?

A. I think it was in the September 5 meeting.

Q. That was in Mr. Gillespie's office?

A. That's right.

Q. Then, two things were accomplished in that meeting. You withdrew your check-off claim and you and the company agreed upon a preamble?

A. I didn't say that. I said I agreed to withdraw it if the company wanted me to, but Mr. Gillespie didn't know at that time [379] whether he wanted to leave it in or wanted to take it out.

Q. Excuse me, sir. Was it ever withdrawn?

A. I don't think it was ever discussed any more.

Q. All right. Is there any other paragraph in your proposal that was abandoned or not discussed any more?

A. I can say without looking at it, no, I don't think there was any of them abandoned any more completely.

* * * * *

[382] By **Mr. Fisher:**

Q. I will ask you if he did not strenuously or seriously object to the irrevocable clause?

A. Did you say or did not?

488 Q. I will ask you if it is a fact, if he did not seriously object to it?

A. I am sorry. Oh, he did object to the irrevocable part of it, yes.

Q. And what was your response?

A. My response was if we had the check-off provision in there, it would be necessary to have it irrevocable for a period of one year.

Q. And I will ask you, sir, if you didn't tell him that without such clause, you did not want it?

A. I did; that is correct.

Q. Did you ever at any time during the progress of the negotiations submit another proposed contract to the company?

A. No, I never got to the point to where I could.

May I ask a question?

TRIAL EXAMINER. Just for clarification, Mr. Wellborn would like to ask you a question.

Mr. FISHER. Sir?

TRIAL EXAMINER. Mr. Wellborn would like to ask a question [383] concerning one that you asked him. He doesn't know.

The WITNESS. What I had in mind when you asked the question, did I ever submit a contract, another contract to the company, you meant a complete contract, did you not?

By Mr. FISHER:

Q. Yes, a complete proposed contract that could be signed and the matter closed.

A. No, I did not.

Mr. FISHER. Do you want to recess for a drink of water? 489

TRIAL EXAMINER. If you care to, yes.

(Short recess)

TRIAL EXAMINER. On the record.

By Mr. FISHER:

Q. Mr. Wellborn, did you ever at any time rewrite and submit to the company your Paragraph 5 following the September 5 meeting?

A. I don't think so, no. If I did, I don't remember it.

* * * * *

[388] By Mr. FISHER:

Q. Paragraph 6. And I will ask you, sir, if you ever agreed to any modification of that paragraph, and I direct your attention to the fact that it has nothing to do with no-staggering of work but only deals with weekly overtime.

A. I think I told you early this morning that the company agreed to that one on September 5, on the union's proposal.

Q. Mr. Wellborn, your attention is directed to Paragraph No. 7 in your proposed contract, General Counsel's Exhibit 3, and I will ask you, sir, if you ever agreed to any modification whatsoever of that Paragraph proposed by you and, if so, when?

A. No, I never agreed to any modification of that paragraph because we wanted it in the contract.

Q. I will ask you, sir, to estimate the number of hours that you and Mr. Gillespie put in reasoning with each other in an effort to reach an agreement with reference to this subject matter, daily overtime. Just estimate the number of hours in our own way or if you want to put it in days, why, do that. **490**

[389] A. Why, I wouldn't have any idea.

Q. Well, it would be many, many hours, would it not?

A. No, it couldn't be too many hours.

Q. Can you recall a meeting between you and Mr. Gillespie when you were engaged in endeavoring to negotiate this contract, that you and he did not discuss the contents of this Paragraph 7, whether it was referred to as Paragraph 7 or not?

A. Well, I am sorry, but I don't have that good a memory. I know we discussed it a great many times. I know Mr. Gillespie wouldn't pay it and I wanted it.

Q. You demanded it?

A. I asked for it.

Q. And never modified or abandoned your demand?

A. I explained to Mr. Gillespie that we didn't have a contract in the United States that didn't have time and a half after eight hours, and I thought it only reasonable that we have it in this contract.

Q. I will ask you if you didn't say to him over and over again in substance at different meetings that you would never sign a contract that did not have that clause in it and that provision in it?

A. I have said to him that I have never signed one that didn't have it in there.

* * * * * * *

[391] By Mr. **Fisher**:

Q. Do you remember what differential you asked for?

A. Yes, I do.

Q. What was it? 491

A. I believe it was six and eight cents.

Q. That was in your original contract proposal?

A. I don't know whether it was or not. I can look at it and see if you want me to.

[392] Q. Well, it was, but look at it. I would like to have you answer.

A. Yes, it was, six and eight cents.

Q. Did there ever come a time during the negotiations when you modified that demand to the extent of one cent or any other amount?

A. Well, actually, it wasn't necessary because Mr. Gillespie told me that if we reached an agreement on the rest of the contract, that one cent difference in what the company was paying and what I asked for wouldn't make any difference. It wouldn't stand in the way of a contract.

Q. When did he tell you that?

A. Sometime during our discussions. I don't know when.

Q. What did you say with reference to the five and eight cents proposed by Mr. Gillespie?

A. Well, as well as I remember, I said I would like to have one more penny added to the five because we were already getting six and eight here in Sherman, and I thought it ought to be the same.

Q. Then, should we understand that neither you nor Mr. Gillespie for the company, showed during the period of negotiations any determined attitude as to that one cent, each of you taking the position that you would not let that interfere with the completion of a contract if that was all that stood in your way? Would that be a fair and correct assumption? 492

[393] A. I don't know how I could ever answer that. I can

only answer that I am sure it wouldn't have stood in the way as far as either one of us were concerned.

* * * * *

[394] By Mr. Fisher:

Q. Your attention is directed to your proposed Paragraph 10, GC-3. I will ask you, sir, if it is not a fact that you and Mr. Gillespie put in much time at different meetings reasoning with each other upon the subject of Sunday work.

A. As I remember, we spent very little time on that.

Q. All right. Did you or did you not ever recede or abandon, recede from or abandon your demand or agree to modify your proposed Paragraph 10?

A. Not that I remember at all.

* * * * *

[395] By Mr. Fisher:

Q. Now, sir, your attention is directed to Paragraph 12, and I will ask you to state when the company first objected to that paragraph, if they objected at all.

A. I don't know whether we ever even discussed the two and a half times for holiday pay or not.

Q. Do you not recall that that was discussed along with your Paragraph 10 providing for two times the straight time hourly rate of pay for Sunday work?

A. I can imagine it was, yes, but I don't remember it offhand.

493 Q. All right. You do know that you never modified your demand for two and a half times straight time hourly rate pay for [396] holiday work, do you not?

A. I didn't figure we ever got to that point.

Q. Well, will you please answer the question.

A. I don't know whether I did or not.

Q. Do you make any claims that you did?

A. No, I don't make any claim that I did or didn't.

Q. Now, Mr. Wellborn, did you ever at any time agree to any modification of your Paragraph 14 in GC-3? If so, when?

A. No, I can tell you we never.

Q. Such paragraph was objected to by Mr. Gillespie on September 5, was it not?

A. Well, it was objected to by Mr. Gillespie, but I don't know what day, every day we met, I guess.

Q. Now, with reference to your Paragraph 15, to which your attention is directed, reporting pay, minimum, did you ever submit to the company any proposal taking the place of that paragraph in your proposed contract?

A. Not that I remember, no.

* * * * *

[404] By Mr. **Fisher**:

Q. I believe, Mr. Wellborn, when you left the witness stand, we were asking you about discussions concerning Paragraphs 15, 16, and 17, or about that point in the contract. I will ask you, sir, if you ever submitted to the company any proposal other than Paragraph 15 in General Counsel's Exhibit 3 relating to reporting pay minimum. 49

A. You mean if I ever submitted any?

Q. Yes, or if Mr. Cox did with authority from you.

A. I don't know whether Mr. Cox ever did or not. I don't believe that I did personally.

Q. Now——

A. You mean a written proposal, don't you?

Q. Sir?

A. You mean a written proposal?

Q. Yes, sir, I mean a written proposal. You do remember that such paragraph was discussed many times during the progress of [405] the negotiations, do you not?

A. I remember discussing it on at least one occasion.

Q. Can you identify that occasion, Mr. Wellborn?

A. No, it was sometime during our discussions. I don't know what meeting it was in.

Q. Well, can you fix it as to the year, whether it was '53 or '54 or both?

A. No, I can't.

Q. You do recall that the Company made more than one proposal on that subject matter, do you not?

A. Well, I recall that we made an agreement, I would say, an oral agreement in one of our meetings—I believe it was on—I don't know when it was—the company would submit one. I think they submitted two; one covering the employees and one covering truck drivers.

Q. Mr. Wellborn, I call your attention to General Counsel's Exhibit 19. [Document handed to witness.]

495 By Mr. **Fisher**:

Q. Please state whether or not you recognize that as being a worked out company proposal on truck drivers reporting and reporting pay that was worked out following long discussions.

* * * * *

[407] By Mr. **Fisher**:

Q. Now, sir, do you recall that you agreed to it, then, except as to the two-hour time limit?

A. No, because when we agree to any written document like this, it is, necessarily has to be a total agreement or actually there isn't any at all.

Q. Mr. Wellborn, I realize that since you have mentioned it, and I will ask you with reference to it, then, sir, it was your understanding that all agreements between the parties on paragraphs were tentative and not to be final and binding on you until the entire contract was completed, and then for the first time such tentative agreement should become final and binding?

A. Well, actually I think that's the way we do operate. Wasn't that a company request that we do operate that way?

Q. That is a question to me, sir, and I am glad to answer it.

A. I am sorry.

Q. I do not recall as to whose request it was, but I will [408] answer your question and say that I do recall that such understanding was reached. But the question is to you. Do you recall it?

A. Yes, we operate on the same basis.

* * * * *

496 V. I. MARTIN—DIRECT EXAMINATION

[490] By Mr. **Fisher**:

Q. During the negotiations, according to your memory, was it made known to the union representatives that Mr. Fant definitely [491] wanted a contract with a no-strike and no-lockout clause providing for penalty against the offender?

Mr. THOMPSON. Now, Mr. Examiner, we do object to that question on the ground that I stated previously, which was premature at that time. What was stated during the negotiations or during the meetings between the parties is as stipulated, contained in the records. Now, unless it is specified by way of introduction that this is something apart from what was stated during the negotiations, General Counsel objects to the question.

TRIAL EXAMINER. Will you repeat the question for my benefit, please.

[Question read.]

TRIAL EXAMINER. It is difficult to rule on the objection without having read the record. I will take an answer subject to my own motion to strike. Was that statement made to the union representatives?

The WITNESS. Yes.

* * * * *

[493] By Mr. FISHER:

Was or was not Mr. Wellborn and the union representatives informed as to the desire of the company to have a contract without an arbitration clause?

A. That is correct.

Q. Were the union representatives—— 497

Mr. THOMPSON. Same objection to that question, incidentally, Mr. Examiner, and the answer.

TRIAL EXAMINER. Yes. As I understand the testimony, the import of the testimony up to date, it is that Mr. Fant did issue instructions or at least instructed his committee, so to speak, of his desires as to what he wanted or did not want in the contract. I have no objection to taking his specific instructions and testimony as to whether or not those instructions were [494] conveyed from time to time through Mr. Martin and Mr. Honea or you or Mr. Gillespie, Mr. Fisher, but I don't think we ought to go into the matters that were discussed at these bargaining sessions so long as we have the whole material, at least we think we do, in transcript form.

Mr. FISHER. Yes, Your Honor, and that accounts for the question being framed as it is, which might be termed a leading question, so to speak.

Trial Examiner. Yes. Well, I recall——

Mr. Fisher. That is the reason it is framed in that fashion.

Trial Examiner. I understand, and I see a reason for it, and I do recall that Mr. Wellborn and Mr. Cox each have testified that they were told in no uncertain terms that the company did not want an arbitration clause set up in their grievance procedure.

* * * * *

[495] By Mr. Fisher:

Q. Mr. Martin, with reference to the making of a contract, 498 do you or do you not recall any meeting with Mr. Fant at any time with other representatives of management, particularly including superintendents in the mill?

A. I do.

Q. Please fix the time of the meeting that you have in mind.

A. If I recall correctly, I believe it was the next morning after the election.

Q. What persons were present at that meeting?

A. Mr. Honea, Mr. Ben Blackburn, Claud Atnip, Johnny Koon, Ralph Robertson, Cecil Neal. There might have been two others that I can't recall. I believe one man's name was Bond, if I am not mistaken, and myself.

Q. What statements, if any, were made by Mr. Fant with reference to obtaining a contract?

A. Mr. Fant made the statement that we would now enter into negotiations with the representatives of the union, we would have a contract, he wanted a contract, a contract that would be workable as to the employees of the company, it would be workable as far as the company was concerned. He cautioned all of the supervisory personnel that were present that he wanted them to bend over backwards, so to speak, to keep everything in a very peaceful manner. He wanted no one fired without absolute wrong [496] doing, and that we would have a contract that would be operable.

Mr. Thompson. Mr. Examiner, I move that the answer and the question be stricken from the record on the ground that it is a completely self-serving statement and of no materiality whatsoever to the proceedings.

Trial Examiner. I am inclined to agree with you. However, I will let it stand. I will consider the weight to be given to it. I don't believe the answer is binding on the General Counsel or the charging party. However, I see the intent of the question. I will permit it to stand. 499

By Mr. **Fisher**:

Q. Mr. Martin, describe in your own way, briefly, please, the effort made by you and Mr. Honea to obtain from the union a workable contract without an arbitration clause, with a clause, and I mean with instead of without, a clause providing for penalty against the offending party in the event of a strike or lockout, and with a provision providing for layoffs and recalls, promotions and demotions based on the ability of the involved employee to do the job as contrasted with period of continuous service alone.

Mr. **Thompson**. I object to the question, Mr. Examiner, on the same grounds enumerated. The transcripts speak for themselves.

Trial Examiner. Yes. I am having a little difficulty here. I think it is abundantly clear from the record so far that the company is contending it met this many times with representatives [497] of the union, and it is their contention, which Mr. Martin would undoubtedly state, that they made every effort to obtain a contract without these particular clauses or with the particular clauses desired. I am afraid we are getting into what is in the record of the meetings themselves. I will permit this, but I wish——

Mr. **Fisher**. That may be true, but we did want this brief description by him in his own words for the record of his own effort made.

Trial Examiner. All right. I will permit it in the record, but I wish you wouldn't go too far. 500

Mr. **Fisher**. Thank you, sir, and I will refrain——

Trial Examiner. You understood the question, didn't you?

The **Witness**. Yes. Shortly after beginning negotiations, the union's representatives were presented with a contract that we deemed a workable contract containing the clauses as we figured or thought we could operate under. If I am not mistaken, those clauses were kicked around and discussed for over a year, which I think is quite an effort to have those clauses in a contract.

* * * * *

[514] By Mr. FISHER:

Q. All right. Did he or did he not at that time make any objection to this contemplated wage increase?

A. He did not.

* * * * *

[515] By Mr. FISHER:

Q. I will ask you when the wage increase, the increase in wages, [516] became effective, as of what date?

A. Monday, October 4, 1954.

Q. Now, sir, on what date did Mr. Fant cause that notice to be posted that you hold in your hand?

A. October 6, 1954.

Q. Was or was not his action and the action of the superintendent in granting that wage increase retroactive to the 4th?

A. That's right.

* * * * *

[516] By Mr. FISHER:

Q. Can you now fix the date on which Mr. Fant decided that he would authorize the wage increase as being October 4?

A. On October 6.

* * * * *

RESPONDENT'S EXHIBIT NO. 3

[8] Mr. GILLESPIE. That is a point we'll want to discuss further down the line. Mr. Martin is vice president of the mill, and I have been attorney for the mill for sometime. And as such we have the authority to negotiate a contract. We, of course, are going to take time to discuss the terms and provisions of the contract with the other responsible members of the management, but so far as our actual authority is concerned, why, we have it. And I guess that about takes care of most of the preliminary setup, doesn't it? Anything else you want?

[35] Mr. **Gillespie.** Well, we'll check that. By the way, Mr. Wellborn, we would like to work through here and give you our idea of things that we do object to, and things that we don't particularly object to. But we would like for it to be clearly understood that we will approve and sign the contract as a whole. In other words, we don't want to put any of it into effect piece meal. If we can get something agreed on and behind us, well and good, but when we actually sign and put the contract into effect, it will be the entire contract that is acceptable to both parties.

Mr. **Wellborn.** Well, that is the only type of contract that we'll agree to.

Mr. **Gillespie.** Well, I think that is entirely logical and proper, but I have, of course, had to find out something about how you handled these and my advice has been to work out your provisions, get the ones that you can agree to, work it along and work it out, but none of it should go into effect until the contract is actually signed. 502

Mr. **Wellborn.** We work on the same basis. We go along and if there is not objection to a paragraph, we just okay that as a tentative agreement, subject to the final approval of the contract. That is about the only way you can work on it.

* * * * *

RESPONDENT'S EXHIBIT NO. 7

[36] Mr. **Gillespie.** We certainly have no quarrel with the seniority principle, and have to the best of my knowledge followed it all the way, where the qualifications were equal or approximately approaching being equal. By the way, in using the word "qualification", I am just using it for brevity. I think to all that means his knowledge, training, skill, efficiency and attitude towards the job are covered by the word "qualification".

Mr. **Wellborn.** Carries a rather broad coverage.

Mr. **Gillespie.** Because in the proposal we spelled it out in definite language of those particular factors, but I wouldn't want to try to repeat all of this string in trying to discuss it, so I used the word qualifications to cover that.

Mr. **Fisher.** Since you all are so near an agreement on this, I wish you would drop down to paragraph thirteen and agree on it.

503 Mr. **Wellborn.** Paragraph 13.

Mr. **Fisher.** Paragraph 13, this agreement shall become effective upon approval of its terms [37] by the union, the majority of the employees and by the responsible officers of the company. Immediately after such approval it shall be signed by the parties and shall continue in effect for a period of one year from the date of signing.

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RESPONDENT'S EXHIBIT NO. 8

[45] Mr. **Wellborn.** Did you give any further consideration to this shift differential of six and eight cents?

Mr. **Gillespie.** What have we got, a six cent differential on shifts?

Mr. **Wellborn.** I believe you've got eight and five now.

[46] Mr. **Fisher.** Have you got Quaker with you?

Mr. **Wellborn.** Yeah.

Mr. **Fisher.** Let me see it.

Mr. **Gillespie.** What is it now?

Mr. **Martin.** Five and eight.

Mr. **Wellborn.** The reason we're asking for six and eight on that is that we've got six and eight in every plant except Quakers. See, if we can get six and eight with yours, then we'll try to get six and eight with them.

Mr. **Martin.** That is a logical thing to do.

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504 [69] Mr. **Gillespie.** Would it make our proposition on that more acceptable if we said not over [70] ten, that you would not be responsible if it was less than ten that walked out?

Mr. **Wellborn.** It wouldn't be acceptable under any circumstances if we're held responsible for unauthorized walkouts.

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RESPONDENT'S EXHIBIT NO. 9

[39] Mr. **Gillespie.** For the purpose of making it clear, suppose you amend it to be read "when the Company agrees on

promotions are made, demotions, lay-offs, etc. are to be made the following factors". (Don't make it that way.) "When they are to be made, the senior employee will be promoted provided he has equal ability, training, and disposition to work."

Mr. **Fisher**. "With the other employees concerned."

Commissioner **Morrow**. I think that sounds all right. That may be what you fellows want.

Mr. **Wellborn**. That sounds like H - - l to me.

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RESPONDENT'S EXHIBIT NO. 10

[16] Mr. **Gillespie**. That is what we worked out last Friday. The Company has always held out for skill being recognized first, you and Wellborn held out for seniority to be recognized first. We worked that out and tentatively agreed we would put the seniority in there first, and then that the man would need equal skill, and so forth, with any other employee considered. That is a compromise between the Company's position that you have to promote a man, first, on skill, then on seniority, time, or how long, then on our proposal it was on seniority first and skill next. 505

Mr. **Cox**. This is more or less what you worked out last Friday, is that right?

[17] Mr. **Gillespie**. The rest of it we worked out last Friday.

Mr. **Cox**. Is that right, Morris?

Mr. **Morris**. Yes, that is the whole subject.

Mr. **Cox**. I believe last Friday, this second paragraph is where the wording was changed. I believe Fisher agreed we would re-write it.

Mr. **Gillespie**. He had a draft of a re-write to be completed. It is really the third paragraph, the second new paragraph starting Article 6.

Mr. **Cox**. Let me see, this, on Article 6, as far as it goes, I don't see too much disagreement. I would like to check further on that.

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[2] Mr. MORRIS. I want to ask if you are going to make any changes further like lead girls, something like that, head packer. In this women's department here, Mr. Gillespie, they are all drawing $1.26 in there. Do you all have in mind putting any [3] of those women head packers, something in there, something like that?

Mr. GILLESPIE. No, we did not. They are all doing about the same thing. We did not have in mind any changes in that.

506 Mr. COX. I want to ask a question on that. After our last meeting, not trying to pull something out of the hat. But in talking to some of the women down there they said new girls come in on the same $1.26 rate, they are drawing the same. There seems to be some wait. I am giving you this as I picked it up. They are checking. They are not getting any more than new girls on the $1.26 rate. Frankly, I don't know what your setup is down there. I picked it up from those women, that has been since our last meeting.

Mr. GILLESPIE. That would be probably covered by "temporary employees". I think there is something to your business in starting people off at the same rate as people that have been working a long time. For that reason, we take them in there, and try them 60 days, and then they can go on and give them 10¢ an hour additional. If they can't, they can get somebody else who can. That will take care of the new girls in [4] that Packing Department, taking care of that squawk. I think you will find that your turnover in women employees is a whole lot more than men. You have new ones in and out of there all of the time.

Mr. COX. Let me ask you these casers and truckers. Are they men or women?

Mr. MORRIS. The truckers?

Mr. COX. Would be men, of course.

Mr. GILLESPIE. Which department is that in?

Mr. COX. That is the Small Package Department, and casers are men?

Mr. MARTIN. Yes.

Mr. COX. These packaging girls, what do they do, they fill packages, do they pack them?

Mr. Honea. Yeah, they fill the package, put the package on the spout, they are automatically packaged. 507

Mr. Cox. In other words, they are packers, is what they are.

Mr. Morris. It goes down the line through the process, it is completed. Men catch it, put it in boxes, cases.

Mr. Gillespie. Got a man who handles it after it gets into the Shipping Department, we have a man there that handles that.

Mr. Morris. Let's see that other thing.

[5] Mr. Gillespie. The main place where there was not an adequate spread was there in the Feed Mill. We recognize that and want to iron it out.

Mr. Cox. Well, I would like to ask you a question on this: I realize that we asked you, and you said you would give some consideration to it, and you have. I am wondering, here is the thing, called my attention, to my mind, the oiler spends all of his time oiling, does he not?

Mr. Morris. That is right.

Mr. Cox. It seems to me, in my thinking, he carries more responsibility than a sweeper and a trucker.

Mr. Gillespie. That is correct, particularly sweeper, but at the same time he carries an oil can, checking that stuff, he does not have the physical work that either sweeper or truckers have.

Mr. Cox. I will go along with you on that, when it comes to physical work. I am quite familiar with that operation. In other words, he is responsible to see those bearings are oiled. He could save your bearings or let them be burned up.

Mr. Gillespie. Actually, the responsibility is to keep them oiled or call the Maintenance Department. If he had a maintenance function, you could do [6] something about it: But in our working out of the thing we did not figure that his responsibility was so great, but what the lack of real physical work would off set it, because if something begins to sound funny in that machinery, that oiler calls someone from the Maintenance Department, rather than fix it. 508

Mr. Cox. I understand that. He does have the responsibility of seeing those bearings are oiled.

Mr. Gillespie. It takes some training and knowledge.

Mr. Cox. A good oiler can save lots of bearings, whereas a bad oiler can burn them up.

Mr. Gillespie. At the same time, a man that is methodical has a reasonable memory can remember, I think his job down there is commensurate without a filling station boy. He has to know where those places are. He has to learn that. There is not much discretion. He keeps them oiled. What we would have tried to do, of course, is put the premium wages on the guys that have discretion in their jobs, have got to decide this or that, if the oiler finds a bearing running hot, he calls the Maintenance Department they are guys that have to have discretion what to do to stop it. What the pellet machine operation, that man has to keep up with and he [7] has decisions to make in running the machine, and batch mixers, grain handlers, and so forth.

(Off the record.)

509 Mr. Gillespie. It does not require a great deal of decision. It is a routine job. We don't have as many different classifications as some of the other mills, but most of the other mills we have seen the classifications, count on a whole lot bigger different types of operations from ours, of course ours is a small but specific operation, and we don't think they can be tied to any other operation because the others are not exactly the same.

Mr. Cox. I would say this: I appreciate the consideration on this. It certainly gives us something to look at.

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[70] Mr. Gillespie. We agreed to pay holidays, we have them in our proposal.

Mr. Cox. Right.

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RESPONDENT'S EXHIBIT NO. 12

[24] Mr. Fisher. Why not drop down to the last part of that paragraph and see if we can't agree on some of the wages that are listed? Commence at the other end instead of that end. If you agree on that, why, maybe Cox will get a little more generous on the top part.

Mr. Cox. I don't think we, the committee is in a position at this time to discuss wages.

Mr. **Fisher.** Wages should be a part of every contract.

Mr. Cox. I agree with you.

Mr. **Fisher.** When will you [25] be in position to discuss wages?

Mr. **Gillespie.** It is very material to the company to know first what wages they're going to be expected to pay and 510
finally what wages they're going to pay. I think it is time we got into that wage setup.

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[28] Mr. Cox. I'll be frank with you, Wellborn and I didn't discuss that any further after the last meeting. I don't know what his thinking is on it. Frankly, I can't see your point in putting it in there, that it can only be used once. I don't know of any contract that has had that provision in there. We don't like to arbitrate. We like to settle our own differences. It is costly to both sides when you have to arbitrate a question, and I think you can check the history of our organization, that we have tried to be fair on all grievances. I think Martin over ~~there will~~ bear out this statement, the dealings he has had with us.

Mr. **Gillespie.** We just flat accepted your statement on this history and that is the basis of this suggestion. Your history of not using arbitration, if the mill should propose it or agree to your proposal on it then, then is there a possibility that you would agree to limiting its use?

Mr. Cox. I would say we would take a look at it.

Mr. **Gillespie.** Now, when are you going to take a look at it?

[29] Mr. Cox. Well, I would have to see first the type of clause you wanted to go along with that.

Mr. **Gillespie.** Well, we'll be perfectly willing for you to submit a clause on that idea. But our last meeting was on the 6th day of May, and you were going to consider that. This is the 21st of May. And apparently you haven't talked to either Mr. Wellborn or the committee about it.

Mr. Cox. Well, I don't remember being left in that—I know 511 you did throw that idea out and I just thought you left it. You said you weren't putting that as a proposal.

Mr. **Gillespie**. I may be incorrect about that. Do you remember?

Mr. **Morrow**. No, I don't. I was under the impression it was going to be considered by both sides. You hadn't any firm offer to make.

Mr. **Gillespie**. No, we didn't make an offer on it. Just a suggestion.

Mr. **Morrow**. I left here with the impression that both of you were going to explore the possibilities of having some sort of limited arbitration. But as to whether or not there was any request that they bring back their thoughts about that, [30] I don't recall that. It would naturally be assumed, however, that both of you would bring back whatever thoughts you might have on it in an effort to try to get together.

Mr. Cox. My notes sure don't show that we was going to consider it or bring back anything on it.

Mr. **Gillespie**. At the last meeting, one of those paragraphs in our proposal, I think it was the grievance procedure, Mr. Wellborn said that he hadn't even read it. It had been before the group for discussion for several months. Now, after we have been out of session for fifteen days you are still willing to consider that suggestion, but haven't considered it. It is a little discouraging to us to work out these things, suggestions and then come up and you haven't even talked about it.

512 Mr. **Morrow**. I wonder if I could have a conference with the union committee?

Mr. **Gillespie**. Yes, sir. You want us to pull out and let you have it in here?

Mr. **Morrow**. That would be easiest, if you don't mind.

(After conference between commissioner and the union committee with all company representatives and the reporter out of the room where said conference was being held, the following proceedings were had.)

[31] Mr. **Morrow**. Ready to start?

Mr. Cox. I've got a suggestion I want to throw out here,—excuse me, commissioner. Did you want to say something first?

Mr. **Morrow**. That is all right. I want to say that we have been discussing this and probably you would have some suggestions to make there.

Mr. Cox. I'm not putting this out as a proposal, but as a suggestion. If the company can go along on the union's proposal on the grievance procedure, the union's proposal on grievance and arbitration, if they limited arbitration to discharge cases; you understand that is just a suggestion that you might think of. I'm not putting that out as a proposal.

Mr. **Fisher**. A good part of the contracts that do have arbitration clauses do have a limitation on arbitration in some respects.

Mr. **Morrow**. Well, may I—I think one of the things you have in mind here is that the limitation of arbitration in all cases, of course, in the case that he has suggested, it would do away with that. It would be much more restricted limitation than some you are thinking about, where the arbitrator is limited to the plain provisions of the contract and so forth. **513**

Mr. **Fisher**. Yes.

[32] Mr. **Morrow**. Well, that would eliminate that, because he wouldn't have anything else to arbitrate except whether or not a man had been discharged without just cause, I'd say.

Mr. **Gillespie**. Let me understand your suggestion, Mr. Cox. You make it as a suggestion, not as a proposal, that if the company will accept the union's grievance and arbitration procedure, then the union might be willing to limit arbitration to discharge cases.

Mr. Cox. Throw that out as a suggestion, yes, for you to consider. We might be able to work out something on that.

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[55] Mr. Cox. And we don't particularly like the word equal, because it gives your foreman a chance to say, well, he ain't equal to the other one. You're not going to find, as I told you this morning, any two people that is going to perform the job exactly alike.

Mr. **Gillespie**. Well, your foreman can just as easily say he doesn't have the ability to do the job in a satisfactory manner. If you assume that the foreman is going to be arbitrary, he can be arbitrary under one just as easily as he can under the other. But we're trying to recognize more efficient application to the job. 514 Some of the fellows will take these ICS correspondence courses, work on those things at night, trying to improve their education and ability to do a job. Well, a man that will do that, I think, ought to get some recognition. [56] Mr. Cox. I don't give a damn how many ICS courses that man takes, it ain't going to make him a flour packer.

Mr. **Gillespie.** I think that is correct. You can't make a flour miller by correspondence any more than you can a soldier by correspondence. But if a man has studied and worked on the thing, then with the opportunity for some practical experience he is going to be able to do a better job than somebody else. You all have been neglecting the truck drivers around here. Suppose Mr. Phelps spent some of his spare time learning more about the mechanics of a truck and how it operated, how to fix it. The other boy just sat behind the wheel and drove it. I think Mr. Phelps would be more familiar with the machine he is operating and would be entitled to some recognition for it.

Mr. **Fisher.** I think that equal came about, Mr. Gillespie, as a compromise in our conversation with Mr. Wellborn.

Mr. **Gillespie.** That is my recollection.

Mr. **Fisher.** The company's position has been that the company would like to recognize with reference to promotions, demotions or recalls the man with superior ability. Mr. Wellborn had talked about the [57] man with satisfactory ability. And then in an effort to get together, someone suggested the word "equal."

515 Mr. Cox. I know that Wellborn don't like the word "equal".

Mr. **Fisher.** Whether it came from Mr. Wellborn or someone else——

Mr. **Gillespie.** Well, if the company wants superior, and the union wants satisfactory, equal is about half way in between. That is a good place to compromise and go on and reach an agreement on this thing. And I think that the only way that we'll ever reach an agreement on some of these contested points is by a compromise. I don't know of any better compromise than half way between two positions than that word "equal" right there. In our original proposal we had it when promotions, demotions, and so forth were to be made, the following factors shall be considered. 1; knowledge, ability, training, skill, disposition to work. 2; length of continuous service from date of last employment. And, 3; family status and number of dependents. I don't think we ought to leave it out. I think that the guy that has got four mouths to feed, it is a whole lot more important for him not to be laid off than a guy who has just got himself to worry about. But you all [58] didn't like it. And we left that out. You didn't like our superior skill and ability and we cut that back to equal. And you didn't like seniority being in second place, so we put it in first place. Now, it looks like to me that we have done all the giving on that.

Mr. Cox. Yeah, on your proposal, but you have knocked out the entire proposal of ours and turned thumbs down period.

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[94] Mr. Morrow. But if you don't—you're not going to find any language that will suit both of you when you don't mean the same thing. I hardly think you will. 516

Mr. Fisher. Well, they agreed on the other paragraph up there to where it does have the same meaning as the second one, as it is written, as I understand.

Mr. Morrow. I think that is true.

Mr. Cox. I don't like that word "equal" and never will.

Mr. Morrow. What would you say about the word "similar ability" then?

[95] Mr. Cox. I don't think we even need it period.

Mr. Morrow. That was satisfactory, where the trouble is. It is not on the language, but it is on the principle.

Mr. Gillespie. You just flat want the man that has been there the longer to get the gravy.

Mr. Cox. If he can do the job, absolutely.

Mr. Gillespie. If he can't do the job, he ain't going to be there long, or do you disagree with that?

Mr. Cox. No, in view of the action taken a few weeks ago, I would be inclined to agree with you.

Mr. Gillespie. You think if a man can't do the job he can't stay down there, or if he don't do the job, let's put it that way, he can't stay there then.

Mr. Morrow. I think you guys had better get back on the contract.

Mr. Cox. Well, it looks like we're still apart on seniority.

Mr. Morrow. Well, there is one thing about it, and I
517 think—it is clear to me, there will have to be a re-evaluation
of the thinking of you people before [96] you will ever find
any language that will express agreement, because there is no
agreement in principle.

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[98] Mr. Cox. I have tried to inject our ideas. They haven't been acceptable to you.

Mr. Gillespie. We have done more than try to inject our ideas. We have come up with a compromise between our original idea and your original idea. Our original idea put first ability with a considerably longer definition. Second, seniority, and third family status. We have put the seniority first. And all that we ask now is that for the senior man to be promoted that he have the equal ability.

Mr. Cox. You made a statement a while ago that the company wasn't going to waive the superiority in the man that got the promotion.

Mr. Gillespie. I think you misunderstood me. We are
perfectly willing if their ability is equal that the seniority con-
trols and the senior man gets the job. Now, if I have said
anything contrary to that, why, ~~I was~~ going against our own
proposal and it wouldn't work. I certainly didn't mean to do
that. If the two, if there are two men being considered for a
promotion and their ability is relatively equal, the senior man
will get it. If they are being considered for a layoff and their
ability is relatively equal, the senior man will stay and the
other man will be laid off. I say that relatively, because in
applying [99] equality, if the difference is small, we would still
go with the senior man. Now, I think we have compromised
518 our position on that materially and the only way we are ever

going to get an agreement on that particular clause is by compromise.

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RESPONDENT'S EXHIBIT NO. 13

[3] Mr. Cox. One of them was, I just merely made a suggestion at the last meeting in regard to arbitration about limiting it to discharge cases and I discussed that with Mr. Wellborn and he says we cannot go along with something like that. We must have arbitration in any and all cases that it is deemed necessary to go that far.

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[28] Mr. GILLESPIE. But that is your problem. We're going to have to find some middle ground in between there and about the only suggestion I know of for your middle ground is your maximums and minimums and you won't take that. So where is our middle ground?

Mr. Cox. Set up a rate for each classification and when we sign a contract, that will be it until we negotiate again.

Mr. GILLESPIE. Now, that is not a middle ground. Mr. Cox, that is just your position. You can set it just as easy by going on and agreeing to [29] our reserving the right to raise wages.

Mr. Cox. That is what we object to.

Mr. GILLESPIE. Now, we object to yours. Let's find something in between there that we can agree to. This thing has been going on and on, and we've got to get it closed up. Get the contract signed.

Mr. Cox. We are willing and able when you work out something that is fair to the employees, and I don't think the way you propose that thing is fair to the employees. 519

Mr. GILLESPIE. That is what we are here for, to get it worked out, but we're not going to get it worked out by each side stating its position. We are going to have to do something in between. If you don't like my maximums and minimums for in between, you make a suggestion for something for in between.

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[30] Mr. Gillespie. We approciate that, and think we understand the union's position. I think we have always made the company's position very clear and we've got to get some middle ground in there before we can reach an agreement. And that's what we are trying to do at these negotiations, is to—we know that you are not going to accept the whole company position, and you, of course, know that the company is not going to accept your whole position. We've got to work out a compromise that we can agree on and get our contract signed. We have suggested a compromise in there and you have turned it down. I think that you folks could work out one and suggest it to us and see if we'll accept it. I don't think we'll ever reach an agreement if we just, each party stands by his position. These negotiations have dragged on a long time. We have got our positions very clearly stated. What we need to do is to get a middle ground that we can agree on and get a middle ground that we can agree on and get this contract signed up and get it out of the way.

520 Mr. Duncan. That wouldn't be bargaining if both done that though.

Mr. Fisher. It seems to me that thought on minimum and maximum is the one that could be [31] agreed upon and to take the wages that are being paid now that have been furnished and everybody knows what that is as to the minimum, and then set a maximum, and the company would have to stay within that maximum.

Mr. Duncan. Wouldn't that work on that deal?

Mr. Fisher. That would work if every man qualified for it.

Mr. Duncan. Set it then like this: set that maximum amount for each department. Well, then, the head of that department, the one that was classified as the head of that department, that is as high as he can go, and he knows that is as high as he can go.

Mr. Gillespie. What we have in mind is a maximum and a minimum for each department. In other words, the head of that department knows he won't get less than that minimum. But he can get more if he gets on the ball and turns out the work.

Mr. Cox. You had better set down and analyze your thinking, you don't want sliding scales on each and every classification, you're going to have more headaches and you ain't going to get the work done.

Mr. **Gillespie**. We want just the right to raise wages, but you don't want us to have the right to raise wages, and we suggest that maximum and minimum [32] as a middle ground that we can agree on, and get that thing out of the way. Now, if that is objectionable, if you all can't agree to that, why, 521
then you figure out a middle ground. You know what we want and you know what you want. If we both can't have exactly what we want, then let's work out something in the middle that is workable and agreeable, and let's get this thing over with. If you want to take the position that you'll not sign any contract that does not have the flat fixed wages in it, why, you can take that position, but we don't have to agree to it. But if you want to take that as a final position, why, we can go on and discuss something else, but that still leaves you a gap standing in the way of your contract. I don't see any sense in our arguing back and forth that we want this and you want that, because we have been over that, we all know exactly what each side wants. Now, let's get somewhere in between there that we can agree on. What I recommend is that during the noon hour you boys get your heads together and see if you can't figure out a middle position and let's take the middle one. We've got about a half a dozen things in that shape and we had better begin to work them out.

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[67] Mr. **Gillespie**. I think we're right to work out those things that we can work out, and keep the thing on a friendly basis, but all kidding aside we've got to do something with these things. We can talk forever if somebody doesn't do some giving and get to a middle ground on it.

Mr. Cox. Ill be glad to discuss with Wellborn what we have spent practically the whole day on.

Mr. **Gillespie**. How about you and Wellborn figuring out 522
something between the two of you, or you and Wellborn and the committee figuring out something that will meet the objections on both sides of that thing and let's get it lined up. As far as I am concerned, if you write it out and send Mr. Fisher

a copy and send me a copy of it and give us a chance to go over it, we'll save a lot of time on this negotiating business.

Mr. Cox. I can't promise that, because I don't know what we can come up with.

[68] Mr. **Gillespie**. If you can't come up with anything, we are sure enough going to be in a bad shape. Maybe we can come up with something. But I don't know what it will be. These negotiations have been friendly and we have enjoyed them, but just going around and around on the same thing, it is keeping all of us from stuff that we need to do. I would like to get the thing settled and behind us.

Mr. Cox. Of course, I would like to, but if I wasn't here I would be somewhere else.

Mr. **Gillespie**. I don't know of a thing in either proposal that we haven't pretty fully discussed and explored.

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RESPONDENT'S EXHIBIT NO. 14

[19] Mr. **Gillespie**. My recollection is that you agreed that this was a pretty good grievance procedure, but you wanted it to go to arbitration rather than the officials.

Mr. **Wellborn**. If I remember correctly, I think possibly you're right.

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523

RESPONDENT'S EXHIBIT NO. 15

[22] Mr. Cox. We don't want to put anything in there that is going to give the company leeway to pass up a senior man and promote a junior man. Now, that is the thing we have been scrapping all the way through. We just as well know what is out here on the table.

Mr. **Gillespie**. That is what we wanted a way back yonder.

Mr. **Fisher**. I thought you wanted all the time a senior man, to use your words, promoted if he wasn't able to do the work.

Mr. Cox. First he has to be given a chance, and you're not going to know whether he is able to do the work or not if he is not given a chance. Of course, if it is somebody physically handicapped, of course, you know he is not going to be able to do it.

Mr. **Gillespie**. Your proposal "promotions, demotions, layoffs and recalls to employment shall be based upon seniority and ability to do the work." Now, we object to that, because promotions, demotions, layoffs and recalls are going to be based on the number of [23] jobs available and whether or not a man is needed for that job. Now, on seniority, I don't care if a man has got ten years seniority and there is not work on his job, he can't work. Now, the way we had that set up, was that when promotions, demotions, layoffs or recalls to employment are to be made by the company. Now, that is determined by the company based on the amount of work to be done, whether there is a job open or not.

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[33] Mr. Cox. We give it to you right in there. I'll tell you, Gillespie, we don't want to seem arbitrary on this equal to work, but by God, it just leaves too much room for argument. 524

Mr. **Gillespie**. If you don't put it in there, why, it leaves room for argument too. I don't care about the contract being long, but if it is not explicit in there, you leave too much room for argument. We are down there. We want to make flour and other products. We don't want to spend all our time arguing.

Mr. Cox. That is why I don't want it in there.

Mr. **Gillespie**. There is no other way that I know of that ability can be recognized. The way you've got that written, it is just straight seniority. The man that has been there one day longer gets the promotion, even if the other man can do twice as much work. Of course, I recognize there is not any man down there that can do twice as much work as any other man can, but the only exaggeration in there is twice as much. There are men down there that can do more work than others down there. Whether that ability to do more is based on willingness or physical ability, I don't know, but the guy that can do the best job ought to have more consideration over a guy that doesn't have but one [34] day longer.

Mr. Cox. Well, that is why we disagree. I think your setup down there where each man is doing a day's work, that is all you need to worry about.

Mr. Gillespie. If I remember correctly, you didn't even agree to put the word "when" back in front of the——

Mr. Cox. I haven't yet.

525 Mr. Fisher. According to——

Mr. Gillespie. According to my notes Cox refuses to add word, "when" in front of the first paragraph. Second Paragraph.

Mr. Cox. That is right.

Mr. Fisher. Hadn't you better put in there "Are to be made by the company"?

Mr. Cox. "Are to be made"——

Mr. Fisher. "Are to be made by the company."

Mr. Gillespie. Yeah, that needs to go in there too.

Mr. Fisher. The way I have my notes on that, why, according to your suggestion, Mr. Gillespie has agreed when promotions, demotions, layoffs, and recalls to employment are to be made by the company, such shall be based upon seniority and ability to do the work. And added [35] the equal that you have mentioned to other employees concerned.

Mr. Gillespie. I want it clearly shown that we're willing to prefer the senior employee provided he has equal ability.

Mr. Cox. That is one thing that makes me sick.

Mr. Fisher. My notes further show that Mr. Cox won't agree to the change.

Mr. Cox. I've already gotten it written down. What are you waiting on?

Mr. Fisher. You won't make the carbon?

Mr. Gillespie. Now then, you get down to the term "con-
tinuous service." The term continuous service as used herein
526 shall mean "the continuous service of the employee beginning
with the date of hiring." How about sticking in front of the
word "date" the word "last," or "the most recent date hired"?

Mr. Cox. Read the next sentence and you've got it.

Mr. Gillespie. Well, couldn't you just eliminate that next sentence if you put that in there?

Mr. Cox. No, I don't think you could.

[36] Mr. **Gillespie**. Is there any objection to putting the last or most recent date in both places?

Mr. Cox. Why does it need to be in both places?

Mr. **Gillespie**. To keep the two sentences from conflicting.

Mr. Cox. They don't conflict.

Mr. **Gillespie**. Would you object to taking the quotation marks off from around continuous service in both places?

Mr. Cox. You're getting awful God damn technical now. I don't know where you're heading next.

Mr. **Gillespie**. I'll tell you just exactly what I was heading for there. I was trying to see if you would agree to make any changes in there. You haven't agreed to anything yet.

Mr. Cox. If you want to turn the whole damn proposal down, turn it down.

Mr. **Gillespie**. No, we're here to negotiate a contract. Not to turn down a proposal.

Mr. Cox. Say yes or no, it don't make any difference to me.

Mr. **Gillespie**. We're here to [37] negotiate. That doesn't mean just turning down. Frankly, to be perfectly honest with you, in asking you to take the quotation marks off, I was just trying to see if you would make any change in it, or if we were just here talking with no point in it. 527

Mr. Cox. That is a silly damn thing to ask for.

Mr. **Gillespie**. That is about as small a change as I could ask you to make, Mr. Cox. I've asked you to make some big ones and you won't agree to it. Now, I was going to try a little one and I tell you perfectly frankly what I am asking you for.

Mr. Cox. When we redrafted this seniority provision we brought it down to a very bare minimum to take care of these people. If you want to turn it down, say so.

Mr. **Gillespie**. In other words, you tell us now that we can either take this seniority clause or nothing. Is that what you mean?

Mr. Cox. I just want your answer on it and see where we go from there.

* * * * *

RESPONDENT'S EXHIBIT NO. 17

[89] Mr. **Fisher**. You have to stop some place.

Mr. **Wellborn**. We are willing to stop.

Mr. **Fisher.** I did not get involved with it. Let's get through with this.

Mr. **Wellborn.** Involved in what?

Mr. **Fisher.** In arbitration. Hadn't you made up your mind to abandon arbitration?

Mr. **Wellborn.** I made up my mind when I signed this contract there will be an arbitration clause in this.

* * * * *

528

RESPONDENT'S EXHIBIT NO. 18

[20] We are getting the Seniority Clause shaped up on that—are usually major issues—grievances—we will get through with that and you can see that we have a complete agreement; and we just feel, with the friendly relationship that we have had all of the way through in this thing; that we can keep right on it, after the Contract is signed, and not have to have that arbitration.

Mr. **Wellborn.** Well, actually, if the Company's [21] policy is as you have stated, and we have no reason to believe different, then, we have two (2) major issues. One that we have is about the Seniority Clause and the arbitration issue, which are two (2) important issues, because as long as the Company treats all people fair, I doubt if you are going to run into those difficulties.

* * * * *

[46] Mr. **Wellborn.** We are going to have to have an Arbitration Clause.

Mr. **Fisher.** Since we are going to quit early today, I would like for you all to go over these things that you have not agreed upon, and they are certainly a few—there are not very many of them—there is just one that I have in mind taking care of but, say, three (3)—more or less—that we have not agreed upon and you have never agreed to wages, however, you have never complained about wages.

Mr. **Wellborn.** We have not gotten to that point yet. We are going to.

Mr. **Fisher.** Let's wrap this thing up by agreeing on everything that we have agreed on right now and investigate this arbitration deal that you are insisting upon. You cannot be too serious about that.

529

Mr. **Wellborn.** You would be surprised as to just how serious I am.

Mr. **Fisher.** I know that you want it but as far as particularly wanting it——

Mr. **Wellborn.** And I am going to get it.

Mr. **Fisher.** Well, now, you are not going to get it today.

Mr. **Wellborn.** Maybe not today.

Mr. **Fisher.** Let's knock off what we can dispose [47] of today.

Mr. **Wellborn.** You just want to make up your mind that we are going to have arbitration.

* * * * *

[76] Mr. **Gillespie.** What do you think we have been doing during all of these negotiations? We have been trying to negotiate a Contract; we are more than willing; we are, however, not just willing; we are getting on it.

Mr. **Wellborn.** It has been apparent to me for more than a year that you are just trying to wear us down to where we will quit——

Mr. **Gillespie.** You had that idea?

Mr. **Wellborn.** Yes, sir.

Mr. **Gillespie.** Well, now don't quit until you get a Contract. If you have got that idea, let's lay that aside; let's just don't quit until you get it.

Mr. **Wellborn.** We don't intend to quit until we get it.

Mr. **Gillespie.** There is that much encouragement and I am glad to have some encouragement from you on this. 530

Mr. **Wellborn.** I am not hurting that bad. In fact, I am not hurting.

Mr. **Gillespie.** I thought, maybe, because of that item—that you were not going to agree to anything.

Mr. **Wellborn.** We just want a Contract that is fair to the people and also fair to the Company.

Mr. **Gillespie.** Why don't you take this Company's [77] Proposal? You take those items that you have and rewrite your own position, and leave out this arbitration that you are talking about.

Mr. **Wellborn.** My soul—stop right there.

Mr. **Gillespie.** And you bring it back to us and see if we cannot wrap it up in one meeting.

Mr. **Wellborn.** We are going to be negotiating with you for the next 6 months or we are going to have an Arbitration Clause in there and, if it isn't in there, at the end of 6 months, we are going to go for another 6 months.

Mr. **Gillespie.** I know that I didn't think that that is involved—why haven't you signed it?

Mr. **Wellborn.** I didn't sign it.

Mr. **Gillespie.** You are just dictating?

Mr. **Wellborn.** I didn't say that.

Mr. **Gillespie.** You don't say that, if it was in there, you would have signed it?

Mr. **Wellborn.** I didn't say any such thing. I said that we 531 would be here for 6 months negotiating and that we are going to have the Arbitration Clause in the Contract.

* * * * *

RESPONDENT'S EXHIBIT NO. 19

[17] Mr. **Fisher.** No. I thought sure my truck drivers would be here. We certainly don't want you to indicate to Mr. Fant we have not been diligently working to get this contract negotiated, if you do, he might have someone to negotiate with you. He is getting impatient. We got his approval [18] on it, gave it to you, and could not get your signature.

Mr. **Wellborn.** You mean he actually approved that one?

Mr. **Fisher.** He approved the one we proposed, and was extremely disappointed we could not get your signature that day.

* * * * *

GENERAL COUNSEL'S EXHIBIT 16

FANT MILLING COMPANY

CONTRACT WITH EMPLOYEES

This contract and agreement made and entered into this the —— day of April, 1954, by and between Fant Milling

Company, a corporation, acting herein by its duly authorized officers hereinafter called Company, and the employees of Fant Milling Company, described in Article 1 hereof, acting by and through American Federation of Grain Millers 532 including its local Union No. 64, hereinafter collectively referred to as Union, Witnesseth:

* * * * *

ARTICLE 4. WORK WEEK. The work week will start with the normal starting time of each employee on Monday and end the following Monday. For the purpose of computing overtime, forty (40) hours will be considered a normal work week, all work in excess of forty (40) hours in any work week shall be considered overtime and shall be paid for at the rate of time and one-half (1½) the straight time hourly rate.

ARTICLE 5. WAGES. The Company shall have the right to increase the wages of any one or more or all of the employees at any time and agrees to pay during the term of this contract or until notice to the contrary is given in writing to the union and employees for a period of not less than two weeks, wages as set out below:

FLOUR MILL

	Hour
Milling Department:	
Second Millers	1.64
Bolters	1.51
Smutters	1.51
Oilers	1.41
Sweepers	1.36
Small Package Packing Department:	
Small Packaging Lead Men	1.46
Casers and Truckers	1.36
Packaging Girls	1.26
Packing Department:	
Head Packer	1.53
Flour Packers	1.46
Mill Feed Packers	1.46
Mixing Department: 533	
Mixer Operator	1.53
Asst. Mixer Operator	1.41
Car Loading Department:	
Car Loading Foreman	1.49
Trucker Lead Man	1.46
Truckers	1.36

FEED MILL

Continuous Operations Dept.:	*Hour*
Feed Mill Foreman	1.52
Pellet Machine Operator	1.41
Batch Mixer Operator	1.36
Grain Handler	1.36
Grinder	1.36
Oiler	1.36
Packer	1.36
Sewing Machine Operator	1.36
Sweepers	1.36
Truckers	1.36
Car Loading Department:	
Trucker Lead Man	1.41
Trucker	1.36
Warehouse Department:	
Trucker Lead Man	1.41
Trucker	1.36

OTHER DEPARTMENTS

Maintenance Department:	*Hour*
Electrician	1.78
Tinners	1.76
Mechanics Class 1	1.76
Mechanics Class 2	1.69
Mechanics Class 3	1.53
Automatic Equip. Maintainer	1.64
Carpenter Class 2	1.64
Electrician Helper	1.41
Mechanic Helper	1.41
34 **Elevator Department:**	
Elevator Operator	1.47
Grain Handlers	1.36
Bag Department:	
Bag Room Supervisor	1.49
Bag Labeler	1.41
Bag Handler	1.36
Bag Cleaner	1.36
Truck Delivery Department:	
Truck Drivers	1.41
Truckers	1.36

It is expressly understood and agreed by the parties that the company has reserved and does hereby reserve the right to establish and put into effect a lower wage scale for any or all employees or any or all departments after posting notice in writing on the Bulletin Board and mailing notice in writing to each Local Union No. 64 and American Federation of Grain Millers of its intention to do so, but in the absence of such notice, shall pay the wages above set forth during the period of this contract.

In the event that the company should put into effect any plantwide reduction of wages without consent of the union or reduce the wages of forty percent of the employees without consent of the union, under this provision of this contract, then the union may at its option terminate this contract, provided a majority of the employees within the union have voted to do so, but not otherwise, which termination shall become operative and effective on the 31st day after notice in writing to the company by the union that a majority of the employees within the unit have voted to terminate this contract and that the union desires to exercise its option to terminate the contract. 535
This contract shall remain in full force and effect and binding upon all parties during the thirty day period last above mentioned and until the 31st day after the giving of such notice in writing by the union.

Article 6. Seniority. Seniority shall be recognized by the Company based upon continuous service and ability to work and disposition toward performing the work to be performed.

It is agreed that when promotions, demotions, layoffs, or recalls to employment are to be made by the Company, the senior employee as determined by continuous service will be preferred, provided he has the knowledge, training, ability, skill, efficiency and disposition to work equal to that of any other employee involved or concerned in the action to be taken.

The term "continuous service" as used herein, shall mean the period of service of an employee beginning with the date of hiring. However, when such service is broken, the term "continuous service" shall relate to and begin with the most recent or last date of hiring. Continuous service shall not be broken by layoff for a period of time or less than one year, absence from work due to sickness, injury or leave of absence granted by the Company but shall be broken when: (a) an employee quits his job; (b) when an employee is discharged; (c) when an employee has been laid off as long as 12 consecutive months; or (d) when an employee fails to report for work

on a regular work schedule without notice to the company that
536 he will not report for work on such regular schedule or fails to report for work at a time designated by the Company for him to report when he is called to work by the Company.

Under clause (d) in the foregoing paragraph an employee shall be deemed to have been called to work only when he (a) has been given actual notice of such call to work, either orally or in writing, at least .... hours before the time designated for him to report, or (b) the Company has mailed to him at his last known address as shown by the records of the Company, notice in writing that he has been called to work at least .... days before the time designated for him to report to work. In the event that the Company does not have in its records or files an address of the employee furnished by the employee either at the time or subsequent to his having been laid off then the Company shall call upon the Union for the last known address of the employee which shall be given by the Union to the Company within .... hours from the date requested: and in the event the Company has no address of the laid off employee and the Union does not have his address, his period of continuous service shall be for all purposes considered to have been broken and terminated and he shall have no right whatsoever to recall to work under this contract.

Article 7. Grievances. Any employee having any complaint in connection with his work may at any time which will not interfere with his work or that of a fellow employee, present his complaint verbally to his company with his shop steward, as he may elect. If a satisfactory adjustment is not
537 reached by the employee and his immediate foreman, then the employee may for himself or through his shop steward or with his shop steward present his grievance in writing to the plant grievance committee within three days from the date it was presented to his immediate foreman and not thereafter. The plant grievance committee shall be composed of and constituted by the stewards in the plant selected by the Union. The plant grievance committee upon receipt of a grievance in writing may within three days from the time his grievance is presented to the grievance committee in writing and not thereafter, present such grievance to the employee's immediate

foreman and attempt to reach a satisfactory adjustment or disposition thereof, if it so desires. It is not intended that any obligation shall rest upon the grievance committee to present to the foreman any complaint or grievance not considered to be meritorious. If a grievance is timely presented in writing by the committee to the immediate foreman of the complaining employee, the foreman shall within three days give to the committee and the employee his determination of the grievance in writing. If either the committee or the employee is not satisfied with the determination of the grievance by the immediate foreman, then the committee or the employee may by writing setting forth in plain words the basis of complaint present such grievance to the superintendent. The superintendent shall fairly and fully consider the complaint or grievance taking such time for obtaining facts as deemed by him to be necessary, not to exceed ten days, however, and then thereafter within three days make a fair and final determination of the grievance. His determination shall be given to the committee and the employee in writing, which decision shall be written 538 in plain and understandable words, and shall be final and binding on all parties unless either the committee or employee shall desire to appeal from such decision to the president of the company or an appeal agent designated by the president. The appeal may be taken by notice in writing to the president that the employee is dissatisfied with the disposition made of his grievance by the plant superintendent, with a copy of all writings connected with the grievance and the handling thereof attached to such notice. When such notice is received, the president shall fix a time and place for hearing the committee or employee or both on the grievance, such time to be within fifteen days from the date of receipt of notice by him. The president shall hear the appeal, and the committee and the employee upon such appeal when so presented to him, or shall designate an appeal agent to act in his place and stead. If the president hears the appeal, he shall make determination thereof in writing and such determination shall be final. If an appeal agent designated by the president shall hear the appeal, he shall make determination thereof in writing and such determination shall be final. If an appeal agent designated by the president shall hear the appeal, he shall make determination thereof in writing signed by him, which shall be final and binding on all parties when approved by the president.

Article 8. Holidays. No employee except in the event of an emergency shall be required to work should he not desire to do so on any of the following recognized holidays: New Years Day, San Jacinto Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

Article 9. Bulletin Board. The Union shall be entitled to 539 have and maintain bulletin boards by each of the time clocks on the Company premises for the posting of notices of Union meetings, recreational and social affairs, appointment of stewards, and results of Union elections, but no other notices or writings of any kind shall be posted on the Board without permission of the general manager or the plant superintendent.

GENERAL COUNSEL'S EXHIBIT 18

Addendum to Company Proposal

ARTICLE 14. REPORTING AND CALL-BACK PAY

Any employee not expected by the Company to report on his next regular work schedule shall be notified by the Company, and when an employee without notice not to report on a regular work schedule reports for work and is not afforded an opportunity to work, he shall receive for reporting an amount equal to two hours regular base pay, which shall be computed as part of his regular work week pay. Should the Company afford an employee so reporting for work on his regular work schedule without notice not to report as much as three hours work at his regular rate of pay, such employee shall not be entitled to premium pay for hours not worked to cover his reporting time. Likewise, an employee called to work by the Company and not afforded an opportunity to work when he reaches the plant in response to the call, shall be paid by the Company an amount equal to two hours regular wages, to be calculated as a part of his work time during the current work week. If afforded an opportunity to work as much as three hours, such employee shall not be entitled to premium pay for time not worked. No part of this paragraph shall in any way be applied to truck drivers, and it is expressly understood that 540 the provisions herein set forth are not applicable to truck drivers. No employee, whether reporting for work on a regular work schedule or coming to work in response to a call back to work at a time not within a regular work schedule, shall be entitled to claim a right to work for any number of hours under this paragraph, or to claim premium pay on account of not being afforded an opportunity to work if the Company is, by reason of public disaster, act of God, mechanical failure, power failure, or any other condition beyond the control of its management, prevented from having work available for such employee so reporting or called back to work at such time.

GENERAL COUNSEL'S EXHIBIT 19

ADDENDUM TO COMPANY PROPOSAL

ARTICLE 15. TRUCK DRIVERS REPORTING AND REPORTING PAY

It is the policy of the Company to afford the truck drivers forty hours work per week, but not to guarantee any truck driver any definite amount of work. The amount of hours worked by any truck driver during any work week shall depend upon the demand for truck transportation of commodities to or from the plant and the number of truck drivers employed and trucks available for operation. To this end, and for the accomplishment of such policy, the truck foreman shall furnish truck drivers desiring to work equal opportunity to work up to forty hours during each work week. Each truck driver, upon completing his run or trip and upon his return to the plant with the truck driven by him shall then report to the 541 truck foreman or to the desk of the truck foreman in the event the foreman is not on the job at the time. If the foreman is on the job, he shall then advise the driver whether or not the driver shall be expected to report at the plant for work or a trip during the next twenty-four hours, if so, the exact time that the driver shall report ready for work. Should the foreman not be in the plant upon the return of a driver after completing his run or trip, then the driver shall look on the

desk of the foreman for a message in writing to him advising him when it is expected that he will again report for work for the commencement of another run. If the truck foreman or the Company expects the driver to report for work within twenty-four hours after the completion of a run and the foreman is not in the plant so that the driver can report to him in person, then the foreman shall leave on his desk for the driver the aforementioned notice in writing advising him when to report for work. A truck driver completing his run and not having reported to the truck foreman in person as provided in this paragraph and not having been notified by writing left on the desk of the foreman when to report for work under the provisions of this paragraph, shall in person or by telephone communicate with the truck foreman within eleven hours of the time at which he completed his last run, and the foreman shall then inform him when he shall report for work. A driver reporting at the plant ready to commence his work in response to notice from the foreman to report for work shall, upon reporting at the time designated by the foreman, be entitled to receive pay for two hours work at his regular rate of pay or
542 afforded an opportunity to work for a minimum of four hours either as a truck driver or on some other job, for which work he shall receive his regular rate of pay, to be calculated as a part of his regular work week pay. Nothing in this paragraph shall be so construed as to prevent the company from permitting any truck driver available at the plant ready and able to drive a truck making any trip desired by the Company, even though the making of such trip by a particular truck driver may result in such driver being afforded an opportunity to work more hours than a fellow truck driver or more than forty hours during a work week. The fact that a truck driver receives more hours work than some other driver because he is available for work when needed shall not constitute a basis for a claim on account of an aggrieved driver that there has been by the Company a discrimination in favor of the driver afforded the work. No disciplinary action shall be taken by the Company against a truck driver employee because of his failure to be available for work at the plant so long as he complies with or has complied with the provisions of this paragraph

concerning his reporting to his foreman for work, but all parties recognize that disciplinary action should be taken against an employee who, without good excuse, is not available for work and has not reported to his foreman as contemplated by this agreement.

Supplemental Appendix 543

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

Case No. 16–CA–752

IN THE MATTER OF FANT MILLING COMPANY AND AMERICAN FEDERATION OF GRAIN MILLERS, AFL

COUNTY COURTROOM,
COUNTY COURTHOUSE, SHERMAN, TEXAS,
Tuesday, September 20, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: Arthur E. Reyman, Trial Examiner.

Appearances: Harrison C. Thompson, Jr., Room 2093, 300 West Vickery, Fort Worth, Texas, appearing as counsel for General Counsel. Mullinax and Wells, by Houston Clinton, Jr., 1716 Jackson Street, Dallas, Texas; and Roy O. Wellborn, Vice President, 2421 N.W. 18th Street, Oklahoma City, Oklahoma; and Ralph Cox, District Representative, 619 East Maple, Enid, Oklahoma, all appearing on behalf of American Federation of Grain Millers, AFL, the charging party. [2] Fisher, McLaughlin & Harrison, by O. B. Fisher, Liberty Bank Building, Paris, Texas; and Gillespie & Gillespie, by C. H. Gillespie, Jr., 210 M&P Bank Building, Sherman, Texas, both appearing on behalf of Fant Milling Company, the respondent.

* * * * *

[34] ROY O. WELLBORN, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: 544

Direct examination by Mr. THOMPSON:

Q. Please state your name.—A. Roy O. Wellborn.

Q. What is your address, Mr. Wellborn?—A. 2421 Northwest 18th, Oklahoma City, Oklahoma.

Q. And what is your occupation, Mr. Wellborn?—A. International vice president of the American Federation of Grain Millers, AFL.

* * * * *

[359] CROSS-EXAMINATION (CONTINUED)

* * * * *

[378] By Mr. **Fisher**:

Q. You now state to the Examiner you abandoned the checkoff?—A. I stated we would if the company desired.

Q. When did you make that statement and where?—A. I think it was in the September 5 meeting.

Q. That was in Mr. Gillespie's office?—A. That's right.

Q. Then, two things were accomplished in that meeting. You withdrew your checkoff claim and you and the company agreed upon a preamble?—A. I didn't say that. I said I agreed to withdraw it if the company wanted me to, but Mr. Gillespie didn't know at that time [379] whether he wanted to leave it in or wanted to take it out.

Q. Excuse me, sir. Was it ever withdrawn?—A. I don't think it was ever discussed any more.

Q. All right. Is there any other paragraph in your proposal that was abandoned or not discussed any more?—A. I
545 can say without looking at it, no; I don't think there was any of them abandoned any more completely. We agreed to modify a great many of them.

* * * * *

[383] By Mr. **Fisher**:

Q. Mr. Wellborn, did you ever at any time rewrite and submit to the company your Paragraph 5 following the September 5 meeting?—A. I don't think so, no. If I did, I don't remember it.

Q. At the meeting of September 5 or at any other meeting, did you as representative of the union agree with the company on a paragraph in a contract to be made between the company and union that would take the place of your Paragraph 5?—A.

I believe that I agreed to a modified version of this which I think you would say took the place of it.

Q. When, please, sir?—A. Oh, I believe it was on April 2.

Q. Of what year?—A. 1954.

[384] Q. And that was at a meeting in Mr. Gillespie's office that you mentioned in your direct testimony?—A. It was the first meeting Mr. Morrow attended. Actually, what the agreement was was just the work week. The rest of it was left out.

Q. All right. I will ask you if the company did not write and submit to you a proposal disposing of that issue between you and the company that you did agree to, the workweek?—A. Not before that. I think they incorporated that agreement possibly in the contract that they submitted.

Q. Will you please refer to the company's proposed contract for your own purposes, and state whether or not you agreed wih the company on a work week, and, if so, when.—A. Well, I just got through telling you that I agreed on April 2 to workweek.

* * * * *

[388] Q. Mr. Wellborn, your attention is directed to Paragraph No. 7 in your proposed contract, General Counsel's Exhibit 3, and I will ask you, sir, if you ever agreed to any modification whatsoever of that paragraph proposed by you and, if so, when?—A. No; I never agreed to any modification of that paragraph because we wanted it in the contract. 546

* * * * *

[389] Q. I will ask you if you didn't say to him over and over again in substance at different meetings that you would never sign a contract that did not have that clause in it and that provision in it?—A. I have said to him that I have never signed one that didn't have it in there.

Q. Well, now, will you please answer the question.—A. I don't know whether I said that or not. I can't remember [390] everything I said in those meetings. It is quite possible.

Q. I will ask you, sir, if you didn't say to him that he would never get a contract with you until he agreed to daily overtime.—A. I doubt seriously if I ever said that. I said many things in the course of negotiations; we all do for the purpose of negotiations. It is necessary; we have to. But I don't know whether I made that statement or not. I can't remember all that.

* * * * *

[RESPONDENT'S EXHIBIT No. 7]

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF OF L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 8TH DAY OF JANUARY, A. D. 1954

Appearances: For the company: C. H. Gillespie, Jr., O. B. 547 Fisher, V. I. Martin, Fred Honea. For the Union: Roy Wellborn, Ralph Cox, W. M. Morris, V. O. Hilley, F. L. Brown, Arthur Phelps.

* * * * *

[121] Mr. WELLBORN. I say we'll take care of the truck drivers. We'll have to talk to the truck drivers so they can tell us how to write it. Getting back to this holiday, that includes, you remember, you said you wouldn't require them to work on holidays if they didn't want to.

Mr. GILLESPIE. Except in the [122] event of an emergency.

Mr. WELLBORN. In the case of an emergency if they do work on a holiday they would be getting double time for it.

Mr. GILLESPIE. That would be my understanding.

Mr. HONEA. Yes; I would think so.

Mr. GILLESPIE. We certainly wouldn't pay one man straight time for not working holidays, and pay a man straight time for working.

* * * * *

[Respondent's Exhibit No. 8]

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF OF L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING IN THE CITY OF SHERMAN, TEXAS, ON THE 29TH DAY OF JANUARY, A. D. 1954

Appearances: For the Company: C. H. Gillespie, Jr., O. B. Fisher, V. I. Martin, Fred Honea. For the Union: Ralph Cox, Roy Wellborn, W. M. Morris, Ed Parker, Clyde Cheeks, W. W. Franks, Onie Ray, E. Perkins.

* * * * *

[45] Mr. Wellborn. Did you give any further consideration to this shift differential of six and eight cents? 548

Mr. Gillespie. What have we got, a six cent differential on shifts?

Mr. Wellborn. I believe you've got eight and five now.

[46] Mr. Fisher. Have you got Quaker with you?

Mr. Wellborn. Yeah.

Mr. Fisher. Let me see it.

Mr. Gillespie. What is it now?

Mr. Martin. Five and eight.

Mr. Wellborn. The reason we're asking for six and eight on that is that we've got six and eight in every plant except Quakers. See, if we can get six and eight with yours, then we'll try to get six and eight with them.

Mr. Martin. That is a logical thing to do.

Mr. Wellborn. I think so.

Mr. Gillespie. Get us in trouble with our neighbors.

Mr. Wellborn. Well, your neighbors have been in trouble with you in the past, haven't they?

Mr. Gillespie. Not with me.

Mr. Fisher. You don't have rotation on the shifts?

Mr. Wellborn. Huh?

Mr. Fisher. You don't have rotation on the shifts?

[47] Mr. Wellborn. You mean at Fant's?

Mr. Fisher. Yes.

Mr. Wellborn. I don't know whether they do or not.

Mr. Franks. Yeah; we do.

Mr. Wellborn. They might agree not to rotate it if you want to suggest it.

Mr. Fisher. Well, no; I was just thinking. I was getting
549 that information for my own thought while you gentlemen were talking about it. I'm not opposed to shift differentials where you have rotation where everybody gets the benefit of it, but where you don't have rotation, I'm still not in sympathy with shift differentials, pay more for working eight hours than you pay another man for working eight hours.

Mr. Wellborn. Actually that was the purpose of it, pay where they didn't have rotation, to get pay for everybody.

Mr. Fisher. Well, as long as everybody gets it it is just a matter of counting the money.

Mr. Gillespie. I know one plant where the biggest majority of the night crew would rather be on the night shift without a differential. It was true a couple years ago. I don't know whether it is still true.

[48] Mr. Wellborn. We run into those situations, but I can't figure how it comes about.

Mr. Cheeks. I'll take my work in the day shift. They can have the night work as far as I'm concerned. I have worked lots of nights. It is not so bad, but I still take days.

Mr. Gillespie. This place I'm talking about, I think the morning shift went on at 6:00 and got off about 3:00. In other words, it was eight hours beginning fairly early in the morning and then the night shift came in and there was enough people that would rather sleep late in the morning and then work until 11:00 at night to pretty well make up that night shift. There had to be some pushing around night and day to make it go, but nearly everybody on the night shift was on there because they liked it. Of course, they could get up and do whatever they wanted to until time to go to work.

Mr. Wellborn. I bet their families didn't like it.

550 Mr. Gillespie. I didn't talk to the families, but usually if a man's family doesn't like something, he is not going to like it too long, because that boss at home can needle him an awful lot. I don't think we can have any disagreement on that unless you're still a bachelor.

[49] Mr. Wellborn. I'm not.

Mr. Gillespie. We can argue that point then. That is, of course, where there is no rotation and there wasn't any shift differential in there. That may not be true here. And it sure would be gravy for the man that had rather work at night to get eight cents extra to do it. I agree with Mr. Fisher, if you've got it on a rotation basis, where everybody is treated the same way, there is more excuse for shift differentials, but you get away from the reason you originally asked for it. Really, the only argument we've got is whether that five cents should be six cents, because we are already paying five and eight.

Mr. Wellborn. Actually the one penny isn't enough for us to haggle over, but every contract we've got in the country has got six and eight with this one exception over at Quakers. And the CIO has got most of the Quaker plant. This CIO and the DPO, they've got eight and five in all of their's. And of course, you know how difficult it is to put up a very stiff argument on the matter of one penny on one shift.

Mr. Gillespie. If we agree to the six and eight here, and you go over and beat Quaker over the head with this and make them agree to it here, then the CIO would get that extra penny in their other plants because [50] then they would have to treat all their other plants the same.

Mr. Wellborn. I think that would be a logical thing, but I guess this is an unfair thing to say, but they are always telling us how much better they treat them than you all treat your employees. 551

(At this point there was some discussion off the record of a jocular nature.)

Mr. Gillespie. Actually I don't think we would hang up on that one cent if we had everything else worked out in a satisfactory way, why, I'm sure that either you would not haggle over it or we wouldn't haggle over it. We might have to draw straws or something to see who didn't haggle, but that is not a major issue, I don't think. We are not willing to agree to it yet and may not be willing to agree to it, because we've got some considerations that go into that too.

* * * * *

[Respondent's Exhibit No. 9]

[1] FANT MILLING COMPANY—UNION NEGOTIATIONS, SHERMAN, TEXAS, ROOM 210 M.&P. BANK BUILDING, APRIL 2, 1954, 2 P.M.

Appearances

For management: V. I. Martin, Fred Honea, C. H. Gillespie, Jr., and O. B. Fisher.

For the Union: Roy Welborne, for the International.

Committee: Messrs. W. M. Morris, Onnie Ray, J. E. Parker, and V. O. Hilley, and Elmer Warren.

Present: T. F. Morrow, Federal Mediation and Conciliation Service.

* * * * *

[39] Mr. Gillespie. For the purpose of making it clear, suppose you amend it to read "when the Company agrees on promotions are to be made, demotions, layoffs, etc., are to be made the following factors." (Don't make it that way) "When they are to be made, the senior employee will be promoted provided he has equal ability, training, and disposition to work" —— 552

Mr. Fisher. "with the other employees concerned."

Commissioner Morrow. I think that sounds all right. That may be what you fellows want.

Mr. Welborne. That sounds like H - ll to me.

Mr. Fisher. What is wrong with it?

Commissioner Morrow. Of course, the reason it does, he put so many things there I don't think it weakens it [40] any, because the ability to do the job carries with it all of the factors.

Mr. Welborne. Actually, are not we saying the same thing, when we say he must satisfactorily perform the thing?

Commissioner Morrow. I think you are. What I am trying to do is get you dog-gone fellows to agree on something. I don't think there is a difference in what you fellows want.

* * * * *

[RESPONDENT'S EXHIBIT No. 10]

[1] FANT MILLING COMPANY—UNION NEGOTIATIONS, SHERMAN, TEXAS, ROOM 210 M.&P. BANK BUILDING, APRIL 8, 1954, 10 A.M.

Appearances

For management: V. I. Martin, Fred Honea, C. H. Gillespie, Jr., and O. B. Fisher.

Committee: Messrs. H. L. Duncan, J. E. Parker, Elmer Warren, V. O. Hilley, and W. M. Morris.

For the Union: Ralph Cox, for the International.

Present: Hon. T. F. Morrow, Federal Mediation and Conciliation Service.

(10:40 a.m.)

* * * * *

[33] Commissioner MORROW. Has there been any agreement on shift differential? 553

Mr. FISHER. No, sir, there has not been any agreement. The Company has paid shift differentials, and it has been discussed, but no agreement.

* * * * *

[RESPONDENT'S EXHIBIT No. 11]

[1] FANT MILLING COMPANY—UNION NEGOTIATIONS, SHERMAN, TEXAS, ROOM 210 M. & P. BANK BUILDING, APRIL 22, 1954, 10:30 A.M.

Appearances

For management: Messrs. Fred Honea, V. I. Martin, C. H. Gillespie, Jr., and O. B. Fisher.

For the Union. Mr. Ralph Cox,, for the International.

Committee: Messrs. Elmer Warren, V. O. Hilley, Gene Yeary (for Mr. Duncan), and Arthur Phelps (for Mr. Parker), W. M. Morris.

(Commissioner T. F. Morrow not present.)

* * * * *

[31] Mr. GILLESPIE. * * *

[32] The thing we have agreed to in the contract is we will recognize those holidays. We have not in our proposal agreed to pay for them. As a matter of policy, we have paid for them, but we would like to leave it on that basis. As a matter of policy we will pay for them because there might come a time we would not be in position to pay for them, what we have agreed to do in our proposal is we will recognize those holidays, outside of the proposal we will do our dead level best to go on and pay for them. We have in the past. * * *

Mr. Cox. They get three weeks every ten years.

54 Mr. Phelps. I could not take three weeks now. That would be too long. You would forget you are working.

[Off the record.]

Mr. Cox. O.K. That is the thing on that. Let's try an issue we have been arguing about.

Mr. Hilley. Then come back to vacations.

Mr. Fisher. He wants to work on that farm.

Mr. Hilley. Yes; if you do some planting.

Mr. Gillespie. You might arrange for a leave of absence to do the plowing.

HOLIDAYS

[69] Mr. Hilley. No.

Mr. Cox. All right. We have agreed to pay holidays and I think from our last meeting our notes does not correspond, but I definitely have in my notes the January—(I have got too many files).

[Off the record.]

(Refers to files.)

The January 8 meeting, according to my notes, we agreed to the six holidays and agreed straight time, double time if worked. That is the thinking of Mr. Wellborne. He was in on that meeting.

Mr. Gillespie. My recollection on that is we agreed to the six holidays, and that our policy had been and would be, as a matter of policy, to pay straight time if not worked, and double time if worked, [70] my notes does not show we agreed to put it in the contract.

Mr. Cox. I am not saying that. I am asking you to agree to put it in the contract.

Mr. Gillespie. We agreed to pay holidays, we have them in our proposal.

Mr. Cox. Right.

Mr. Gillespie. Do you want to put the pay rates in there? We will put in that the mill will endeavor to pay straight time for holidays not worked, and double time if a man works on holidays. What you are not going to like is endeavor to continue. I know you will not like it, but I don't see how we can go much further than that. 555

Mr. Fisher. I believe it should be added "it is expressly understood no-holidays pay is agreed or contracted to" so as not to be arguing about whether you endeavored or did not endeavor.

Mr. Gillespie. That is my suggestion on that.

* * * * *

[Respondent's Exhibit No. 12]

[1] CONTRACT NEGOTIATIONS HEARING OR CONFERENCE BETWEEN FANT MILLING COMPANY AND THE AMERICAN FEDERATION OF GRAIN MILLERS, AF OF L, HELD IN THE OFFICE OF MR. C. H. GILLESPIE, JR., IN THE MERCHANTS & PLANTERS NATIONAL BANK BUILDING, IN THE CITY OF SHERMAN, TEXAS, ON THE 21ST DAY OF MAY 1954

Appearances

For the Company: C. H. Gillespie, Jr., O. B. Fisher, V. I. Martin.

For the Union: Ralph Cox, W. M. Morris, V. O. Hilley, Arthur Phelps, Onie Ray, Elmer Warren.

Hearing held before Mr. Ted Morrow, as commissioner.

* * * * *

[75] Mr. Cox. All right. Give me your interpretation on the second paragraph.

Mr. Gillespie. The second [76] paragraph reads, it is agreed that when promotions, demotions, layoffs or recalls to employment are to be made by the company, the senior em-

ployee as determined by continuous service will be preferred, provided he has the knowledge, training, ability, skill, efficiency
556 and disposition to work equal to that of any other employee involved or concerned in the action to be taken.

That means that if the senior employee's ability is equal to any one else within the group that is being considered, he gets the preference. If it is a promotion, he gets the promotion. If it is a layoff, he don't get the layoff. Now, if you want to, we can just cut everything out of that string of words except ability and maybe agree on that one with reference to the same definition.

* * * * *

[89] Mr. Cox. We have not asked you to say seniority and quit there.

Mr. GILLESPIE. Well, you have asked us to restrict it to ability to do a satisfactory job. [90] You won't go along and let us give a preference to the man that has greater ability.

Mr. Cox. You want a superior man. That is what you want.

* * * * *

[RESPONDENT'S EXHIBIT No. 18]

[1] TRANSCRIPT OF PROCEEDINGS—CONTRACT NEGOTIATIONS

FANT MILLING COMPANY

v.

AMERICAN FEDERATION OF GRAIN MILLERS, AFL

Sherman, Texas, September 17th A.D. 1954, 10:30 o'clock a.m., Law Offices, Messrs. Gillespie & Gillespie, Suite No. 210—Merchants & Planters Bank Building

[2] *Appearances*

Hon. O. B. Fisher, of Paris, Texas, Messrs. Gillespie & Gil-
557 lespie, of Sherman, Texas, by Hon. Campbell Gillespie, Hon. V. I. Martin, Vice President, Fant Milling Company, for the Company. Hon. Roy O. Wellborn, Oklahoma City, Okla., International Vice President, American Federation of Grain Millers.

Committee: Hon. H. L. Duncan, Elmer Warren, V. U. Hilley, and Johnny Watson, of Sherman, Texas, for the Union.

* * * * *

[7] Mr. **Wellborn**. The reason that I used that particular phraseology in demanding an Arbitrator, if one was necessary, is because I have gathered through our discussions here previously that you would like to have a share, and there are a number of matters that we have discussed as basic and still make the point. Incidentally, we usually don't use the American Arbitration Association in the selection of Arbitrators, where it is necessary, but we have found recently that some of the companies prefer to use their facilities rather than to try to determine one through the parties.

We have no particular preference whether we use the American Arbitration Association or whether we agree to select an Arbitrator between the parties involved. That is the shortest and quickest way to make an arbitration clause, naturally. I hope that we never have to use one and, if the Company is as fair as the counsel seems to think that they will be, I am pretty sure that we will never have to use one; but we did take the grievance procedure practically as the Company had written it; and I did put in the arbitration clause just in case it becomes necessary at some time in the future that we have to use [8] arbitration.

* * * * *

[Clerk's Certificate to foregoing transcript omitted in printing.]

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[Minute Entry of Argument and Submission—April 23, 1958, omitted in printing.] 558

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559 In the United States Court of Appeals for the Fifth Circuit

No. 16953

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY, RESPONDENT

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D.C.

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

Opinion

(August 1, 1958)

CAMERON, Circuit Judge. The question presented by Petitioner's prayer for enforcement of its order of April 19, 1957 is whether the Respondent, pursuant to its duty as imposed by N.L.R.B.,[1] bargained in good faith with respect to the matters
560 contained in the charge filed against it by its certified Union. Respondent, Fant Milling Company, was, during the period involved, engaged in the business of milling flour at Sherman, Texas, and employed about two hundred people. Pursuant to an election, American Federation of Grain Millers, AFL, was certified June 26, 1953 as the exclusive bargaining agent for its employees.

From August 13, 1953 to November 19, 1954 Respondent and the Union met on nineteen different occasions in which discussions were held directed towards working out a contract between the parties.[2] The meetings between the parties were conducted by the local officers and attorneys of the Company, on the one side, and two national representatives of the Union from Oklahoma and a local committee of three to six employees, on the other. No contract having been agreed upon,

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[1] 29 U.S.C.A. § 151 et seq.

[2] These meetings were held August 13, September 5 and 26, November 12, and December 9, 1953; and January 8 and 29, April 2, 8, 19 and 22, May 6 and 21, June 11, July 16 and 30, August 27, September 17, October 15, and November 19, 1954.

Respondent, having concluded that the Union no longer represented a majority of its employees, on October 7, 1954 granted a general wage increase to its employees after discussion with the Union representatives but without specific notice to them; and, on November 19, 1954, it posted a notice that it was informed that the Union no longer represented the majority of employees and that it would not do business further with the Union, but would deal directly with its employees.

The Union had, many months prior thereto, filed a charge of unfair labor practices against Respondent upon which, fifteen months later, a complaint was issued; and a 561 hearing was held before a Trial Examiner, who entered his intermediate report finding Respondent guilty of failure to bargain in good faith, and recommending that a cease and desist order be entered. The Board, one member dissenting,[3] adopted the Trial Examiner's report and entered the order which it is seeking to have us enforce.

The question before us will be resolved largely upon a determination of the effect of evidence as to what transpired long after the charge was filed, and as to negotiations and actions of the parties not embraced in or contemplated by the charge.[4]

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[3] 117 N.L.R.B. 1277.

[4] Respondent urges that the Board's finding was not based upon substantial evidence. The Trial Examiner, after noting that the parties had settled upon a good many minor matters, stated: "It seems almost inconceivable that company representatives could sit down over the long period of time with Union representatives as they did here and not be considered to have been bargaining in good faith." The challenge of this statement and the impressions made upon us by the oral arguments stimulated us to read this long record rather than to rely upon the appendices. At the outset, one is struck with the fact that the Company pitted two "local boys," unskilled in such matters, against two experts who made the negotiation of contracts their life's work; and with the fact that the Company shackled its representatives at the outset by requiring the statement to be made that certain areas of agreement would never be included in a contract. Under N.L.R.B. v. Denton, 5 Cir., 1954, 217 F. 2d 567, and N.L.R.B. v. J. H. Rutter-Rex Mfg. Co., 5 Cir., 1956, 229 F. 2d 816, this alone would tend to cast suspicion from the start upon the Company's negotiations.

The Regional Director first turned down the Union's charges, and there is not in the record more than a hint of anything improper until after October 1, more than a year after the negotiations had been begun.

Both sides proved themselves hard traders, but neither the Trial Examiner nor the Board is able to point out anything smacking of the shrewd and

562 The Trial Examiner and the Board predicated their orders essentially on the withdrawal of union recognition, one step in which process was the wage increase of October, 1954. The dissenting member has set forth succinctly his estimate of the attitude of the majority and the basis of its decision, and we quote in the margin some excerpts from his dissent.[5] We agree

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sinister scheming and action necessarily included in the deliberate adoption of a course of negotiations as a mere pretense.

The final action disowning the Union and granting the wage increase, which the Company claimed was necessary to hold its workers against the overtures of its competitors, tend naturally to arouse suspicions and to entice reliance upon the specious doctrine post hoc ergo propter hoc. But we have said that "It is necessary that the courts make it clear" that the finding of the Board must be based "upon clear proof derived from evidence and not from suspicion and conjecture * * *" See, infra, N.L.R.B. v. I.B.S. Mfg. Co. at p. 638.

But it is not necessary for us to sustain this contention of Respondent because the other points fully discussed in the opinion clearly require that we deny enforcement.

[5] "A reading of their [the majority's] opinion shows that the *crucial element in their evaluation of the course of the Respondent's conduct is the wage increase which the Respondent gave its employees in October, 1954. Thus their opinion is almost entirely devoted to a consideration of that wage increase, and they have candidly admitted that the Respondent's granting of the wage increase has given them a 'final insight' into the Respondent's conduct of negotiations with the Union.* My colleagues' decision appears therefore to *affirm the Regional Director's decision not to issue a complaint on the basis of his evaluation of the Respondent's conduct preceding the October 1954 wage increase.* And I, too, agree that but for the wage increase there would be no case whatever against the Respondent. But *as this case turns on the wage increase, the critical issue is whether the wage increase—which occurred after the Union filed its charge, and which was not made the subject of a second, or amended, charge—may lawfully be made the basis of a finding that the Respondent violated the Act.* In my opinion, it may not.

"* * *

"The Courts of Appeals for the Seventh and Fifth Circuits have held respectively, in the Indiana Metals [Indiana Metals Products Corp. v. N.L.R.B., 7 Cir., 1953, 202 F. 2d 613] and Newton [N.L.R.B. v. Newton, 5 Cir., 1954, 214 F. 2d 472, 475] cases, that Section 10(b) precludes the finding of an unfair labor practice predicated on acts that occurred subsequent to the filing and serving of a first charge and more than 6 months prior to the filing and serving of an amended charge, even though the acts in question were similar to those alleged in the charges. * * *

"In the instant case, *the Respondent's October 1954 wage increase occurred about 5½ months after the charge was filed, and almost 10 months before the complaint issued.* The October wage increase—*which according to the majority is the nub of the case* against the Respondent—was never made the with the estimate and the conclusions as set forth in the quoted portions of this dissent. 563

An understanding of the significant facts with which we are dealing requires that a few decisive dates be kept in mind. May 20, 1954, the Union filed its charge of unfair labor practices, naming November 21, 1953 as the date of their beginning (in recognition of the 6 months period provided in the statute). At the time the charge was filed, eleven bargaining sessions had been held and a wage increase had been given certain employees effective April 19. July 13, the Regional Director refused to issue a complaint based upon this charge, and July 31 the Union filed a written request for review of this refusal, which the dissenting member treated as an appeal to the General Counsel. November 20, the Company posted a notice withdrawing its recognition of the Union as bargaining agent, preceded by the general wage increase of October 7. January 24, 1955, the Regional Director withdrew his refusal to issue the 564 complaint and followed this action with the issuance of a complaint August 17, 1955. Eight bargaining sessions had been held between the date of the filing of the charge and the date of the issuance of the complaint.

The charge signed by Ralph Cox, international representative for the Union, was made out on a printed form and we quote in the margin the contents of the charge under the printed heading "Basis of the Charge."[8] The complaint, is-

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subject of a second or amended charge. Accordingly, even if the complaint herein be regarded as a substitute for such a second or amended charge, the Board is, by virtue of Section 10(b), and under the holdings of the Indiana Metals and Newton cases, *precluded from predicating a violation of the Act on the basis of that October wage increase.* This conclusion is impelled by the language of Section 10(b) for, as the Court said in the Newton case, '*Without the limitation, we have placed on Section 10(b) of the Act, its provisions would be rendered meaningless to a great extent.*'." [Emphasis added.]

[8] "On or about November 20, 1953, it, by its officers, agents and employees, refused to bargain collectively with the authorized agents of American Federation of Grain Millers, AFL, chosen by a majority of its employees at its plant to represent them for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

"On or about the dates set opposite their respective names below, it, by its officers, agents and employees, terminated the employment of: Tony Polk

sued about fifteen months thereafter and based on the charge of May 20, begins with the statement: "It having been charged by American Federation of Grain Millers * * * that Respondent has engaged in and is now engaging in certain unfair labor practices * * * the General Counsel * * * hereby alleges as
565 follows."[7] Both the complaint and the notice of hearing referred to the charge of May 20, 1954, and a copy of that charge was therewith served upon Respondent.

In summary, therefore, the determinant facts are these; May 20, 1954, the Union filed a charge of unfair labor practices based upon Respondent's actions during the six months preceding that date. The Regional Director refused to file a complaint based upon that charge and those actions. Fifteen months after the charge had been filed, the Regional Director issued and served the complaint before us purporting to be based upon it, but setting up, as the only factual recital of an unfair labor practice, a wage increase granted 4½ months after the filing of the charge. Based upon this wage increase of October 7 and the ensuing withdrawal of recognition of the Union, the Trial Examiner and the Labor Board concluded that Respondent had failed to bargain in good faith with the Union. It is perfectly plain, as set out in the dissenting member's language quoted *supra*, that, without these happenings

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April 23, 1954 Clyde Gordon April 23, 1954 W. M. Morris April 24, 1954 Onnie Ray April 24, 1954 because of their membership and activities in behalf of American Federation of Grain Millers, AFL, a labor organization, and at all times since such dates it has refused and does now refuse to employ the above named employees.

"By the acts set forth in the paragraphs above, and by other acts and conduct, it, by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

[7] "8. On or about November 21, 1953, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph 5.

"9. On or about October 7, 1954, Respondent, without notice to the Union, put into effect a general wage increase for all employees in the unit described above in paragraph 5.

"By the acts described in paragraphs 8 and 9, Respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of section 8(a), subsection (5) of the Act."

more than four months after the filing of the charge, the order before us would not have been entered—in fact, the complaint would not have been issued.

We think the order was not justified by, but was in plain disregard of, the statute which alone vested the Board with authority to act: 566

> Whenever it is charged that any person *has engaged in or is engaging in any such unfair labor practice,* the Board * * * shall have power to issue and cause to be served upon such person a *complaint stating the charges in that respect,* and containing a notice of hearing before the Board * * *: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon * * *. [Emphasis added.] 29 USCA § 160(b).

Since the authority of the Board derives solely from the statute, it is clear that effective action can be taken only when the machinery set up by the statute is substantially followed. It is further clear that a charge must set up facts showing an unfair labor practice as defined in 29 USCA § 158, and the facts must be predicated on actions which have already been taken. When the Board is satisfied that the facts contained in the charge have been substantiated, it or its agents then have power to issue and serve upon the person charged with the improper action "a complaint stating the charges in that respect." This language can have no meaning except that the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge. 567

Assuming that another charge could have been filed embracing the happenings of October and November, 1954, or the original charge amended to include them, it was not proper for the Board to proceed on the basis of the charge of May 20, 1954 and enter the order here before us bottomed upon actions taken more than four months later.[8] That this is what it did is exemplified by what the Board said was the issue it was trying: "The issue before us is whether the Respondent, in this long course of dealing with the Union, fulfilled its duty to negotiate in good faith so as to justify its refusal in November 1954 to prolong the discussion of collective bargaining issues, or whether on the other hand it evaded its legal duty and was thus without warrant in November 1954 and thereafter for refusing to meet with the Union." Substantially eight of the eleven pages constituting its decision are devoted to a discussion of what transpired in September, October and November.[9] If the Board could thus adjudicate the rights of the parties on such subsequent actions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent carte blanche to expand the charge as they might please, or to ignore it altogether. 568

The Board predicated its authority to try the charge on the issues thus defined by it, on our case of N.L.R.B. v. Anchor Rome Mills, 1956, 228 F. 2d 775. We do not agree that the cases are apposite. Anchor involved refusal of the employer to hire and keep 346 named persons who had engaged in a strike against it. Two charges were filed by the union, one in November, 1949, and the other in May, 1950, and both were couched in very broad terms. The complaint filed by the General Counsel averred that, at all times since the first date charged, Anchor had refused to employ the named persons because of their activity on behalf of the union and because they had engaged in the strike.

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[8] Respondent, by timely motions and continuing objections, tried without success to limit the decisive period to the six months covered by the charge.

[9] The Trial Examiner also devoted the greater part of his report and findings to a discussion of the company's right to break off negotiations with the union. This paragraph epitomizes his concept of what was before him:

"An important question here is whether or not the records reflect a refusal on the part of the Respondent to bargain at a time when it was honestly at an impasse with the Union and was fully convinced that the Union no longer represented a majority of the employees in the bargaining unit, or whether the Respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority status. The critical question is whether under the circumstances of this case the employer was entitled to withdraw recognition of the Union on the basis of a good faith doubt as to the Union's majority. [Citing several cases.]"

The Board relied upon our quotation there from a decision of the Seventh Circuit in N.L.R.B. v. Kohler Co., 1955, 220 F. 2d 3, 8, that "The six month limitation refers only to acts that occur before the charge and does not prevent the inclusion of similar or related acts happening after the charge."[10] The similar and related acts there referred to consisted of mere repetitions of applications by the former employees named in the charges which had been made within the two six-month periods covered by them.[11]

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[10] What the Seventh Circuit said in the Kohler case, at 220 F. 2d p. 7, is worthy of note here:

* * * if it [the Board] gets so completely outside of the situation which gave rise to the charge that it may be said to be initiating the proceeding on its own motion, then the complaint would fail as not supported by the charge.

[11] Petitioner also relies heavily on our case of N.L.R.B. v. Harris, 1953, 200 F. 2d 656. The two cases do bear some resemblance in their facts, but the action taken in Harris subsequent to the filing of the several charges was merely a carrying out of what had been determined upon before the last charge was filed, and was merely the culmination, closely related in point of time, of a series of closely related happenings during the period covered by the charges.

In Harris, the union and the employer had negotiated for 3½ years, and in early January 1950, it appeared that the negotiations were to be fruitful. January 7, the union advised the employer that it desired to discuss the new statutory minimum wage schedule to become effective January 25. The employer consented to meet with the union in early February, and the union pressed for a definite date, but the employer finally postponed the meeting until February 18 or 20. In the interim, the employer had raised wages and the union promptly advised that in so doing, it had breached the agreement between them and that the union would file charges. Upon receiving such advice, the employer responded that no further negotiations would be conducted "until the situation is clarified." This response was contained in a letter dated February 16, two days after the union had filed its last charge.

The basis of the Board's finding was that the employer had refused to bargain in good faith from the time it was advised, on February 10, that the union would file charges. This threat, within the ambit of the charges, caused the employer to break off negotiations, but notice of its action was deferred until two days after the last charge was actually filed. The

570 We do not have any similar situation here. This charge grew out of the seven bargaining sessions held between November 21, 1953 and May 20, 1954. Neither the Trial Examiner nor the Board found, and the evidence does not reflect, that any lack of good faith was practiced during that period. The parties had discussed at length, paragraph by paragraph, a contract proposed by the Union; and Respondent had also submitted its own version of a contract. The question of seniority was discussed at six of the meetings, vacations at five, arbitration at three, duration of the contract at one, overtime at two, shifts at four, holidays at three, grievances at two, and wages at five of the meetings during the six month period.

The limited raise in wages of April 19 was the result of the discussions between the parties and was initiated by the Union.[12] While the Union representatives testified that they did not think they were notified of this wage in-
571 crease, it is clear that the Company merely adopted the Union's proposal in making these minor adjustments. At all events, the Union made no objection or protest to what was done, and did not list this wage adjustment as an unfair labor practice when, within about four weeks, it filed its charge setting forth its grievances against the Company.

Board held that this two-day delay, under the circumstances, was not fatal to the right of the Board to pass upon the action then taken. Our opinion states that further wage increases and work benefits were made by the employer subsequent to February 16, the time lapse not being indicated. At all events, it was the break, actually consummated before the last charge was filed but confirmed in writing two days after, which lay at the base of the Board's decision, which we affirmed. The difference between that case and this one is too apparent to require elaboration.

[12] Cox, the Union's negotiator, testified: "I asked the company to take a look at the wage rate in the feed mill, that it appeared to me that there was too many classifications on the $1.36 rate, that it seems to me there was a need for some wage adjustment on those classifications. I asked them to look at it and consider it so we could discuss it at the next meeting."

The quoted testimony referred to the meeting of April 8. At the next meeting on April 22, the Company complied with the Union's request that the wage adjustments be then discussed by advising that it had considered the Union's suggestions and had made the adjustments as requested ranging from two to five cents per hour to some of the employees of the feed mill, same to be effective as of April 19.

This Court has given a clear indication of the limitations surrounding the reception of evidence of transactions outside the six month statutory period, N.L.R.B. v. I.B.S. Mfg. Co., 1954, 210 F. 2d 634, 636–7:

> He [the Trial Examiner] also agreed with the general counsel that evidence of events antedating the six months period could properly be offered and considered as *background evidence* in determining whether respondents had violated the Act * * *
>
> * * * It is one thing to hold, as we have done, that it is admissible to add two or three names to the list of dischargees *after the period*, or to otherwise *amplify and expand a charge by the addition of details* in line with its general substance. It is quite another thing to hold that *an entirely new and different cause of action* based on matters occurring more than six months before the cut-off date for the filing of the charge may be asserted. [Emphasis added.]

These words of Chief Judge Hutcheson are in keeping with what we held in N.L.R.B. v. Newton, 1954, 214 F. 2d 472, where we quoted at length (at pages 474–475) from the Seventh Circuit case of Indiana Metal Products Corp. v. N.L.R.B., 1953, 202 F. 2d 613, 619, and is consonant with our recent 572
holding in No. 16662, White et al. v. N.L.R.B., Apr. 23, 1958, rehearing denied May 29, 1958, —— F. 2d ——.

What the Trial Examiner and the Board have done in the case before us is to issue an order against Respondent based upon its withdrawal of union recognition more than four months after the filing of the charge in the course of which a general across-the-board wage increase was granted. If the Union desired this issue to be placed before the Board, it had substantially ten months before the complaint was issued in which to file a new or an amended charge. For some reason the Union choose not to do this, and the Board and its agencies were without power under the law to do it for them, or to consider it as having been done. No serious argument is made that the order is, or could be, based upon anything happening prior to May 20, the time the charge was filed, or even prior to October 1. For these reasons, the petition to enforce the order of the Board is

Denied.

Hutcheson, *C. J.*, concurring:

Were the only question in this case whether the record as a whole supports the Board's finding that, as charged by the Union and alleged in Par. 8 of the complaint, respondent refused to bargain in good faith with the Union, in violation of
573 Sec. 8(a)(5)(1) of the Act, I would content myself with concurring in the view of the majority that, under settled law, N.L.R.B. v. American National Insurance Co., 343 U.S. 395, it does not.

In view, however, of the issue discussed in the opinion of the Board and that of its dissenting member and in the majority opinion and that of the dissenting judge of this court, whether the Board's opinion, that the charge was proved, was incorrectly based on matter not properly before the Board because it was not embraced in the charge, and because I agree with the dissenting member, I have concluded to point out briefly why I think that the Board majority was wrong, the dissenting member right.

First, it is to be noted that in the charge against employer filed by the Union on May 20, 1954, Rec. p. 19, 20 and 21, only two violations were charged. One of these was that on or about November 20, 1953, respondent refused to bargain collectively with the Union. The other was that on or about April 23 and April 24, 1954, the dates named in the charge, certain employees were discriminatorily discharged.

Second, it will be noted that, while paragraph 8 of the complaint, record p. 88, alleges, as was charged in violation No. 1 of the charge, that on or about November 20, 1953, respondent refused to bargain, violation No. 2 of the charge, the discriminatory discharges of employees complained of, was not alleged.

Third, and this is the crux of the matter, paragraph 9 of the complaint, alleging: 574

> On or about Oct. 7, 1954, [a date five months after the filing of the charge], respondent, without notice to the Union, put into effect a general wage increase for all employees in the unit described above in par. 5.

undertakes in effect without any charge supporting it to complain of a violation having no connection with or relation to the two violations charged to have occurred before the charge was filed. The result is that the examiner, the majority of the Board and the dissenting judge in this court have been led to find a violation of the matter charged in paragraph 9 of the complaint, on the specious claim that the matter so alleged was supported by the charge. In saying this, I agree with the dissenting member of the Board that but for this allegation, unsupported by any charge and for the proof that came in under it, there was, there could be, no reasonable basis for the finding of the Board. Without aid from this source, in short, the Board's finding, that the respondent did not bargain in good faith, runs directly counter to the teachings of the statute, the American National Insurance Company case, supra, and all the cases following in its train, including White v. N.L.R.B. (5 Cir.) —— F(2) ——, April 23, 1958. In short, what has happened here is that by the device of injecting into the case entirely new matter completely unrelated to the charge, the regional director, in violation of the provisions of the Act, that no complaint can be filed except one based upon a charge, has filed a complaint, and the Board has heard and condemned 575 the respondent in respect of matters which, because of the lack of a charge, were not before it. In my opinion, none of the cases cited and discussed support the Board's finding, and I concur in denying enforcement.

RIVES, *Circuit Judge*, dissenting:

According to my view, substantial evidence on the record as a whole amply supports the Board's finding that respondent refused to bargain in good faith with the Union in violation of

574 Section 8(a) (5) and (1) of the Act. Keeping in mind the date on which the charge was filed, and with the strictest possible application of the Section 10(b) limitation, the following occurred between November 21, 1953 and May 20, 1954: (*A*) Respondent's negotiators functioned under instructions from its president that they were not to yield in any respect on three important matters: (1) Seniority was not to be the sole factor governing promotions. (2) The contract must not contain an arbitration provision. (3) The contract must contain a no-strike clause with a monetary penalty for its breach. Restrictions (2) and (3) are especially important when considered together. Respondent could not in good faith demand that the Union surrender its statutory right to strike and at the same time refuse to agree upon some other effective method of securing a review of grievances. "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement
576 not to strike." Textile Workers v. Lincoln Mills, 1957, 353 U.S. 448, 455. By thus circumscribing the authority of its negotiators, the respondent effectively prevented any bona fide bargaining. (*B*) The Union repeatedly requested the respondent to furnish it with a list of employees together with classifications, wage rates, and employment dates, and the respondent supplied a partial list only, and continually failed to live up to its promise to supply other such relevant data. National Labor Relations Board v. Item Company, 5th Cir. 1955, 220 F. 2d 956. (*C*) On April 19, 1954, respondent put into effect wage adjustments at its feed mill admittedly without
575 consulting the Union, and thereby clearly showed that it was merely going through the motions of collective bargaining. Armstrong Cork Co. v. National Labor Relations Board, 5th Cir. 1954, 211 F. 2d 843, 847; National Labor Relations Board v. H. G. Hill Stores, 5th Cir. 1944, 140 F. 2d 924, 926. The foregoing, along with a number of other practices noted in the Examiner's report and in the Board's Decision, occurred within the most rigid concept of the six-month period prior to the filing of the charge. Without reference to subsequent events, I think that the foregoing furnishes substantial evidence to support the Board's finding that respondent refused to bargain in good faith.

The charge is in no part of the pleadings in the case. It precedes the filing of the complaint, and has for its purpose the setting in motion of a preliminary investigation to determine whether or not a complaint based upon such charge should issue. National Labor Relations Board v. Westex Boot & Shoe Co., 5th Cir. 1951, 190 F. 2d 12. The charge need not, as the **577** majority implies, be restricted to "*actions which have already been taken.*" To the contrary, the charge required by Section 10(b) of the Act is "* * * that any person has engaged in or *is engaged in* any such unfair labor practice, * * *." [Emphasis supplied.] Accordingly, on May 20, 1954, the Union charged that the respondent "has engaged in *and is engaging in* unfair labor practices within the meaning of Section 8(a), subsections (1) and (3) and (5) of he National Labor Relations Act.". [Emphasis supplied.] "Is engaging in" carried the time element up to the filing of the complaint. The complaint alleged that respondent had unlawfully refused to bargain on or about November 21, 1953, "*and at all times thereafter.*" [Emphasis supplied.] It was entirely proper, I think, for the complaint to include such conduct occurring after the charge. Naoional Labor Relations Board v. Harris, 5th Cir. 1953, 200 F. 2d 656, 658; National Labor Relations Board v. Anchor Rome Mills, 5th Cir. 1956, 228 F. 2d 775, 779; National Labor Relations Board v. Local 1423, United Brotherhood of Carpenters, etc., 5th Cir. 1956, 238 F. 2d 832, 836. With deference, the contrary construction of Section 10(b) by the majority seems to me excessively technical and restrictive, and, if sustained, I believe that it will seriously cripple the Board in any effective enforcement of the Act.

On October 7, 1954, the respondent granted a general wage increase to its employees which the majority concedes was "without specific notice" to the Union representatives, but states that it was "after discussion" with them, and was also **578** after the respondent had "concluded that the Union no longer represented a majority of its employees." On both of those statements I disagree, and find the facts to be accurately stated in the parts of the Board's brief quoted in the margin.[1]

579 I think that the Board had a right to consider the October 7, 1954, general wage increase and the November 19, 1954, express withdrawal of recognition from and refusal to continue to meet with the Union. When those acts are considered, it is not even debatable that the Board's finding that respondent refused to bargain in good faith with the Union is supported by substantial evidence on the record as a whole. The proof, indeed, goes beyond any reasonable doubt. I therefore respectfully dissent.

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[1] "In the latter part of September respondent's president, without consulting the Union, decided to grant a general wage increase of seven cents per hour and informed the mill supervisors of his decision (R. 119–120; B.A. 66–68, 73). On October 4 or 5, Union negotiator Wellborn stated to Martin, respondent's vice-president, 'I hear that you have given a seven cent raise to the employees.' When Martin admitted this, Wellborn asked, 'Aren't you aware that you should have contacted or told me or discussed it with me about giving the employees a raise.' Martin's reply was that seven or eight years earlier, when he was employed elsewhere, he had given wage increases without contacting Wellborn and the latter had made no objection. (R. 120; B.A. 58–60, 63–64.) On October 6, respondent posted a notice officially announcing the wage increase, which was made retroactive to October 4. Admittedly, respondent gave the Union no prior notice of this action (R. 120, 165, 175; B.A. 63–64, 68–73, 292).

"The meeting scheduled for October 10 was in fact held on October 15 (R. 161–162). * * *

"The next, and final, meeting was not held until November 19. On that date, respondent stated that it felt that the Union was not interested in a contract and that it had received 'information from what the mill considers to be accurate reliable sources' that the Union no longer represented a majority of the employees in the bargaining unit. Respondent accordingly for the first time advised the Union that 'we just simply at this time do not recognize the Union as the bargaining agent for the employees at the plant' and that it was 'refusing to bargain any further' (R. 121, 162; B.A. 20, 286, 289, 292). Prior to this meeting, the Union's majority had not been questioned (B.A. 21). The Union asked the source of the information regarding its alleged loss of majority, and respondent replied 'Just by word of mouth' (B.A. 21, 290).

"On the same day, respondent publicly announced its withdrawal of recognition in a notice posted on a plant bulletin board (R. 121, 166; B.A. 22–23, 108–109). In a letter transmitting a copy of this notice to the Union, respondent stated that 'the information which the Company had, with reference to the desire of its employees [not to be represented by the Union], came through verbal statements of the employees' (ibid)."

In United States Court of Appeals for the Fifth Circuit 580

No. 16953

NATIONAL LABOR RELATIONS BOARD

v.

FANT MILLING COMPANY

Judgment

August 1, 1958

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an Order of the National Labor Relations Board, made on April 19, 1957 in the proceeding known upon the records of the Board as Case No. 16–CA–752, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that said petition for enforcement be, and the same is hereby, denied.

HUTCHESON, *Chief Judge*, concurring.

RIVES, *Circuit Judge*, dissenting.

In United States Court of Appeals for the Fifth Circuit 581

No. 16,953

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY, RESPONDENT

Decree

September 18, 1958

Before HUTCHESON, *Chief Judge*, and RIVES and CAMERON, *Circuit Judges*.

By the Court:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated April 19, 1957. The Court heard argument of respective counsel on April 23, 1958, and has considered the briefs and the transcript of record filed in this cause. On August 1, 1958 the Court, being fully advised in the premises, handed down its decision denying the enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, adjudged and decreed that enforcement of the order of the National Labor Relations Board dated April 19, 1957, directed against the Respondent, Fant Milling Company, Sherman, Texas, and its officers, agents, successors and assigns, be and it hereby is denied.

Entered: September 18, 1958.

* * * * *

582 [Clerk's certificate to foregoing transcript omitted in printing.]

583 Supreme Court of the United States

No. 482. October Term, 1958

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY

Order allowing certiorari

December 15, 1958

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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* * * * *

582 [Clerk's certificate to foregoing transcript omitted in printing.]

583 Supreme Court of the United States

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Mr. Justice Frankfurter took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANT MILLING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on August 1, 1958, denying enforcement of an order issued by the Board against Fant Milling Company (R. 117–129).[1]

OPINIONS BELOW

The opinion of the court below (*infra,* pp. 18–37) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 117–129, 137–182) are reported at 117 NLRB 1277.

JURISDICTION

The court below entered its judgment on August 1, 1958 (*infra,* p. 38). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

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[1] "R" refers to the transcript of record; "B. A." refers to the appendix to the brief filed by the Board in the court of appeals.

QUESTION PRESENTED

A union, certified by the Board, filed a charge alleging that the employer was not bargaining in good faith. The Board in due course conducted an investigation and issued a complaint alleging that the employer had violated its bargaining obligation. The question presented is whether the Board in formulating its complaint is circumscribed by a requirement that it confine itself to the specific facts recited in the charge, or whether it may place substantial reliance upon events occurring after the filing of the charge which were uncovered during the course of the investigation.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

* * * * *

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with re-

spect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon * * *

STATEMENT

I. The findings, conclusions, and order of the Board

A. The bargaining negotiations

The American Federation of Grain Millers, AFL-CIO, herein called the Union, won a Board-conducted election in June 1953, and became the certified bargaining representative of respondent's employees (R. 148; B. A. 4). Thereafter, representatives of the Union and of respondent met in a series of approximately twenty bargaining conferences between August 1953 and November 1954, but failed to reach agreement on a contract (R. 148–153; B. A. 40–43). Prior to the commencement of these negotiations and on a number of subsequent occasions, respondent's president instructed his negotiators to bear in mind that "he would not sign a contract" that contained an arbitration clause; that the contract must contain a no-strike clause with a monetary penalty for its breach; and that seniority was not to be the sole governing factor in promotions or layoffs (R. 164; B. A. 46–47, 73–74).

During the course of the negotiations, the Union made repeated unsuccessful requests for a list of employees in the unit, together with their classifications, wage rates, and dates of employment. These requests were made on August 13, November 12, 1953, and January 29, 1954, before the Union filed a charge with the Board, and on July 2 and October 15, 1954, after the filing of the charge (R. 148–149, 160, 162, 19; B. A. 10, 141–142, 191–194, 240–244, 272–274, 276–278).

In April 1953, during the course of the negotiations, and about one month prior to the filing of the Union's charge, the Company put into effect certain wage adjustments for some of the employees without negotiating with the Union concerning the changes (R. 165, 176–177, 19; B. A. 15–17, 61–62). Again in October 1954, while negotiations were in progress but after the filing of the charge, the Company, without notice to or consultation with the Union, instituted a general across-the-board wage increase (R. 119–120, 165, 175, 19; B. A. 55–60, 63–68, 73, 292). The Company's action in instituting these wage changes without prior negotiation with the Union on the subject was consistent with the Company's insistence throughout the bargaining sessions (both before and after the filing of the charge) that any contract it signed must provide for the Company's right to raise wages without any negotiation with the Union (R. 156–157, 159; B. A. 12–13, 17, 93, 95, 100, 103, 150–153, 211–213, 233–235).

The last bargaining session was held on October 15, 1954 (R. 161–162; B. A. 269–284). At this meeting, the Union protested the Company's action in granting a wage increase without notice to or consultation with the Union (R. 120, 161; B. A. 274–276). Various other subjects were discussed, but by the end of the meeting the parties had still reached no agreement as to whether the contract should contain an arbitration provision, as to whether the contract should contain a no-strike clause, and as to the extent to which seniority should govern promotions and layoffs (R. 161–162; B. A. 269–284). In addition, no agreement had been reached as to whether the contract should include commitments by respondent to continue its existing practices with respect to paid vacations, shift differentials, and regularity of working hours (B. A. 116–117; 134, 182–188). Respondent had agreed, however, to pay overtime for work in excess of 40 hours a week, to refrain from discriminating against employees because of union membership, and to give the Union space in the plant for a bulletin board (B. A. 93, 95, 97).

When the parties met again on November 19, 1954, the Company announced that it would no longer recognize the Union as the employees' bargaining representative and that it would not bargain further (R. 121, 162; B. A. 20, 286, 289, 292). The Company alleged that it had received "word of mouth" information that the Union no longer represented a majority of the employees (B. A. 21–23, 108–109, 290).

B. Proceedings before the Board

On May 20, 1954, after several months of fruitless bargaining conferences, but prior to the October wage increase unilaterally effected by respondent, the Union filed and served an unfair labor practice charge, alleging that respondent "has engaged in and is engaging in unfair labor practices" in that it refused to bargain collectively and had discharged four employees for union activities (R. 19–23). By letter dated July 13, the Regional Director for the Board's Sixteenth Region advised the Union that he was refusing to issue a complaint, on the ground that "it does not appear that there is sufficient evidence of violation to warrant further proceedings at this time" (R. 138, n. 2; 25). On or about July 31, the Union requested the General Counsel of the Board to review such refusal (R. 138, n. 2; 27). On January 24, 1955, subsequent to the unilateral wage increase of October 1954, and while the request for review was pending, the Regional Director advised the Union that "Upon reconsideration of the facts and circumstances, and additional evidence furnished us in connection with our investigation in the above matter, we have decided to withdraw our refusal to issue Complaint with respect to the 8 (a) (5) allegation of refusal to bargain, dated July 13, 1954. We shall proceed with our investigation in due course" (R. 126; 80). On August 12, 1955, the General Counsel informed counsel for the Union as follows (R. 125-126; 82-83):

> With respect to the 8 (a) (5) allegation of refusal to bargain, the Regional Director advised the parties by letter dated January 24, 1955, that he was withdrawing his dismissal of the 8 (a) (5) portion of the charge and was continuing with the investigation thereof. All further inquiries with respect to the 8 (a) (5) allegation should be addressed to the Regional Director.

On August 17, the Regional Director issued the complaint herein, alleging that "On or about November 21, 1953 [six months prior to the filing of the charge], and at all times thereafter, respondent did refuse and continues to refuse to bargain collectively"; that "On or about October 7, 1954, respondent, without notice to the

Union, put into effect a general wage increase"; and that by those acts "Respondent did engage in and is thereby engaging in an unfair labor practice," violative of Section 8 (a) (5) of the Act (R. 85–89).

C. The Board's conclusions and order

On the basis of "all the relevant facts as shown by the record in this case," the Board, in agreement with the Trial Examiner (R. 167–177), found that respondent was not bargaining in good faith with the Union, thereby violating Section 8 (a) (5) and (1) of the Act (R. 118–127). The Board observed that the general wage increase given by respondent "while negotiations were still continuing, and in complete disregard of the Union's representative status, provides the final insight into the respondent's conduct of negotiations with the Union" (R. 126). Accordingly, the Board concluded that "after November 21, 1953 * * * respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act" (R. 126).

In so holding, the Board (one member dissenting) held that the bargaining negotiations and the unilateral wage increase which occurred *after* the filing of the charge were properly within the scope of the complaint as the conduct involved was similar and closely related to that involved in the charge (R. 123–125, 134–135).

Accordingly, the Board ordered the Company to cease and desist from refusing to bargain; to refrain from interfering with the Union's efforts to bargain; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 127–129, 136–137).

II. The holding of the court below

The court below, Judge Rives dissenting, set aside the order of the Board (*infra,* pp. 18-37). Judge Cameron, writing the opinion in chief, was of the view that the Board's finding of refusal to bargain, as alleged in the complaint, rested upon the unilateral wage increase of October 1954, and that this action was not properly cognizable by the Board as it occurred after the filing and service of the charge (*infra,* pp. 21–31). In his view "* * * the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge" (*infra,* pp. 25–26). Chief Judge Hutcheson, concurring, agreed with Judge Cameron's holding that the unilateral wage increase was not to be taken into account by the Board (*infra,* pp. 32–33). Judge Hutcheson further stated that, but for the unilateral increase, the record was devoid of any basis for the Board's finding that respondent had not bargained in good faith (*ibid.*). Judge Rives, dissenting, was of the view that respondent had been guilty of a refusal to bargain within the six months preceding the charge, and that in any event the unilateral wage increase occurring after the charge was properly considered by the Board (*infra,* pp. 33–37). In Judge Rives' view, the holding of the majority that such post-charge conduct was not cognizable by the Board was "excessively technical and restrictive, and if sustained, * * * will seriously cripple the Board in any effective enforcement of the Act" (*infra,* p. 35).

REASONS FOR GRANTING THE WRIT

The holding of the court below that the Board could not consider the unilateral wage increase as evidence of an unfair labor practice[2] because it was not the subject of a charge conflicts with the holding of the Third Circuit in *National Labor Relations Board* v. *Epstein*, 203 F. 2d 482, 485, certiorari denied, 347 U. S. 912. The holding also conflicts with this Court's decision in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 367–369, albeit that case preceded the 1947 amendment of the National Labor Relations Act.

In the *Epstein* case (as here), after the Union filed a charge alleging a refusal to bargain, the employer engaged in further unfair labor practices including the effectuation of a unilateral wage increase as to which no timely charge was filed. The Third Circuit sustained the Board's action in finding that the post-charge conduct was violative of the Act, "for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects." 203 F. 2d at 485. In so holding, the Third Circuit relied on this Court's holding in *National Licorice*, *supra*, and stated that "The amendment to the Act does not change that holding." (*ibid.*) To similar effect, see *National Labor Relations Board* v. *Kohler Co.*, 220 F. 2d 3, 7–8 (C. A. 7).

The amendment in question added to Section 10 (b) of the Act the proviso that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *." Both the original Act and the amended Act contained the provision, relied on by the court below (*infra*, p. 25), that after the filing of a charge the Board may issue a complaint "stating the charges in that respect." In *National Licorice, supra,* however, this Court rejected the contention that this language "precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." 309 U. S. at 369. The 1947 amendment restricted the Board's power to probe events occurring more than six months *prior* to the charge, but both the language of the proviso and its legislative history show that it was designed to provide a period of limitations governing past violations, not to alter the rule of the *National Licorice* case relating to subsequent violations.[8]

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[2] That the unilateral wage increase constituted a refusal to bargain violative of Section 8 (a) (5) is settled by this Court's holdings in *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 223–225, and *May Dept. Stores* v. *National Labor Relations Board*, 326 U. S. 376, 385.

In confining the Board to the events alleged in the charge, the court below has misconceived the separate functions served by the charge and the complaint, respectively. The charge is not framed by lawyers with an appreciation of the legal significance of the details of conduct. On the contrary, a charge may be filed by laymen, often semi-literate workers, who may be only dimly aware that in some way their rights are being invaded. The charge "does not even serve the purpose of a pleading" but "merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18. To require a charging party to particularize each and every act constituting an unfair labor practice would place upon him the burden and expense of investigating and determining the full nature and scope of the employer's or the union's misconduct. Congress, however, has purposefully placed the responsibility for investigating such details upon the Board, a public agency vested by statute with the necessary investigatory machinery. Moreover, to require the details of the unfair labor practices to be specified in the charge would place upon the charging party the responsibility for framing the issues in the case, a matter which Congress left to the Board in the complaint. *National Labor Relations Board* v. *Tex–O–Kan Flour Mills Co.,* 122 F. 2d 433, 437 (C. A. 5); *Consumers Power Company* v. *National Labor Relations Board,* 113 F. 2d 38, 42 (C. A. 6); *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415–416 (C. A. 10).

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[8] S. Rept. No. 105, 80th Cong., 1st Sess., p. 26, 1 Legislative History, p. 432; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 53, 1 Leg. Hist. 557.

If, as the court below stated, the complaint is to be confined to the exact contours of all claimed violations set forth in the charge, then the failure of the charging party to allege certain violations would preclude their development by the Board, and the statutory machinery would be turned into a vehicle for the vindication of private rather than public rights. See *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362, and authorities there cited; see also *Medo Photo Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 687. Nothing in the amended Act suggests that Congress intended any such drastic departure from the basic concept that the Board, once its jurisdiction is invoked, acts in the public interest, and is not limited by the contentions of the charging party. On the contrary, the amended Act retains the provisions of the original Act which give the Board broad investigatory power (Section 11). It also retains the provision which permits the Board to amend its complaint at any time (Section 10 (b)). The significance of these provisions would be seriously curtailed if the Board were restricted to the violations particularized in a charge.

The foregoing considerations have led the courts of appeals to conclusions directly opposite to that of the court below. Compare the statement of the opinion-in-chief in this case: "* * * the complaint must faithfully reflect the facts constituting the unfair labor practice as presented in the charge" (*infra*, pp. 25–26), with the holding of the Second Circuit that the Board must be given "wide leeway for prosecuting offenses unearthed by its investigating machinery, set in motion by the original charge,"[3a] the recognition by the Third and First Circuits that

> it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations[4]

[3a] *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 721 (C. A. 2), affirmed 347 U. S. 17.

[4] *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 15–16 (C. A. 1).

and the observation of the Seventh Circuit that "it is without significance that the complaint was broader than the original charge."[5]

The general principle that the Board is not limited to the precise allegations of the charge, but may include in its complaint violations uncovered in the course of investigation, applies to violations committed after, as well as before, the filing of the charge. Nothing in the policy or language of the statute requires the Board, in the course of its investigation, to be blind to violations currently being committed. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 369.

The court below appeared to regard the unilateral increase of October 1954 as "an entirely new and different cause of action" from that involved in the original charge (*infra,* pp. 26–31, and n. 10, pp. 27–28). Although the court below thus purported to recognize the rule that the Board may consider post-charge conduct related to that which occasioned the charge, its ruling that the conduct here was not so related effectively nullifies the rule and imports inapposite principles of common-law pleading into this area of administrative procedure. The unilateral wage increase in this case was effectuated while the parties were still engaging in the bargaining conferences which had led to the filing of the refusal to bargain charge. Throughout these conferences, the employer had insisted that the Union agree to a clause surrendering the Union's right to negotiate over wage increases (*supra*, p. 5). The employer's unlawful action in instituting a unilateral wage increase while negotiations were continuing could serve but to emphasize the claim advanced in the charge that the employer was not approaching the bargaining with the good faith required by the Act. *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U. S. 217, 224; *May Dept. Stores* v. *National Labor Relations Board,* 326 U. S. 376, 385. To hold, as did the court below, that the Board was precluded from considering such a violation because it was "unrelated" to that alleged in the charge is to exclude all post-charge conduct from the Board's ken except that which either so closely follows the charge in point of time so as to be, in effect, part of the *res gestae* or is merely an exact repetition of the pre-charge conduct.

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[5] *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149.

As the dissenting judge correctly observed, the effect of this holding is to "seriously cripple the Board in any effective enforcement of the Act" (*infra,* p. 35). In some cases, to be sure, the problem here presented can be averted by the timely filing of additional or amended charges. In many instances, however, this solution is impractical and administratively undesirable. Under the holding of the court below, each new bargaining conference, each new unlawful statement violative of Section 8 (a) (1), or each picketing of a new neutral employer violative of Section 8 (b) (4), must be followed by a new or amended charge, placing an unnecessary burden both on parties whose rights have been invaded and on the Board's administrative machinery designed to vindicate those rights. Moreover, the new matter contained in the charge may be uncovered by the Board in the course of its investigation, and the charging party may be unaware of it or of its legal significance. Once the Board has been apprised by a charge that a situation exists which warrants investigation and threatens industrial peace, the development of the case is in the hands of the Board, and not of private litigants. *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415 (C. A. 10).

CONCLUSION

The court below has decided an important question under this Act in a manner which conflicts with decisions of this Court and of other courts of appeals. The petition for a writ of certiorari should therefore be granted.[6]

Respectfully submitted,

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OCTOBER 1958.

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[6] Should this Court grant certiorari and reverse the court below, question may arise as to the form of the remand. In our view, the case should be remanded with instructions to enter a decree enforcing the order of the Board. The Board's finding that respondent was guilty of a general refusal to bargain was well within the competence of the Board (cf. *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U. S. 938), and under the limitations of review set forth in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 488, the order should therefore be enforced.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16953

NATIONAL LABOR RELATIONS BOARD, PETITIONER
versus
FANT MILLING COMPANY, RESPONDENT

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.[1]

(August 1, 1958.)

Before HUTCHESON, *Chief Judge*, and RIVES and CAMERON, *Circuit Judges*.

CAMERON, *Circuit Judge:* The question presented by Petitioner's prayer for enforcement of its order of April 19, 1957 is whether the Respondent, pursuant to its duty as imposed by N. L. R. A.,[1] bargained in good faith with respect to the matters contained in the charge filed against it by its certified Union. Respondent, Fant Milling Company, was, during the period involved, engaged in the business of milling flour at Sherman, Texas, and employed about two hundred people. Pursuant to an election, American

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[1] 29 USCA § 151 et seq.

Federation of Grain Millers, AFL, was certified June 26, 1953 as the exclusive bargaining agent for its employees.

From August 13, 1953 to November 19, 1954 Respondent and the Union met on nineteen different occasions in which discussions were held directed towards working out a contract between the parties.[2] The meetings between the parties were conducted by the local officers and attorneys of the Company, on the one side, and two national representatives of the Union from Oklahoma and a local committee of three to six employees, on the other. No contract having been agreed upon, Respondent, having concluded that the Union no longer represented a majority of its employees, on October 7, 1954 granted a general wage increase to its employees after discussion with the Union representatives but without specific notice to them; and, on November 19, 1954, it posted a notice that it was informed that the Union no longer represented the majority of employees and that it would not do business further with the Union, but would deal directly with its employees.

The Union had, many months prior thereto, filed a charge of unfair labor practices against Respondent upon which, fifteen months later, a complaint was issued; and a hearing was held before a Trial Examiner, who entered his intermediate report finding Respondent guilty of failure to bargain in good faith, and recommending that a cease and desist order be entered. The Board, one member dissenting,[3] adopted the Trial Examiner's report and entered the order which it is seeking to have us enforce.

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[2] These meetings were held August 13, September 5 and 26, November 12, and December 9, 1953; and January 8 and 29, April 2, 8, 19 and 22, May 6 and 21, June 11, July 16 and 30, August 27, September 17, October 15, and November 19, 1954.

[3] 117 NLRB 1277.

The question before us will be resolved largely upon a determination of the effect of evidence as to what transpired long after the charge was filed, and as to negotiations and actions of the parties not embraced in or contemplated by the charge.[4] The Trial Examiner after noting that the parties had settled upon a good many minor matters, stated: "It seems almost inconceivable that company representatives could sit down over the long period of time with Union representatives as they did here and not be considered to have been bargaining in good faith." The challenge of this statement and the impressions made upon us by the oral arguments stimulated us to read this long record rather than to rely upon the appendices. At the outset, one is struck with the fact that the Company pitted two "local boys," unskilled in such matters, against two experts who made the negotiation of contracts their life's work; and with the fact that the Company shackled its representatives at the outset by requiring the statement to be made that certain areas of agreement would never be included in a contract. Under *N. L. R. B.* v. *Denton*, 5 Cir., 1954, 217 F. 2d 567, and *N. L. R. B.* v. *J. H. Rutter-Rex Mfg. Co.*, 5 Cir., 1956, 229 F. 2d 816, this alone would tend to cast suspicion from the start upon the Company's negotiations.

The Regional Director first turned down the Union's charges, and there is not in the record more than a hint of anything improper until after October 1, more than a year after the negotiations had been begun.

Both sides proved themselves hard traders, but neither the Trial Examiner nor the Board is able to point out anything smacking of the shrewd and sinister scheming and action necessarily included in the deliberate adoption of a course of negotiations as a mere pretense.

The final action disowning the Union and granting the wage increase, which the Company claimed was necessary to hold its workers against the overtures of its competitors, tend naturally to arouse suspicions and to entice reliance upon the specious doctrine *post hoc ergo propter hoc*. But we have said that "It is necessary that the courts make it clear" that the finding of aminer and the Board predicated their orders essentially on the withdrawal of union recognition, one step in which process was the wage increase of October, 1954. The dissenting member has set forth succinctly his estimate of the attitude of the majority and the basis of its decision, and we quote in the margin some excerpts from his dissent.[5] We agree with the estimate and the conclusions as set forth in the quoted portions of this dissent.

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[4] Respondent urges that the Board's finding was not based upon substantial evidence.

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the Board must be based "upon clear proof derived from evidence and not from suspicion and conjecture * * *." See, *infra*, *N. L. R. B.* v. *I. B. S. Mfg. Co.*, at p. 638.

But it is not necessary for us to sustain this contention of Respondent because the other points fully discussed in the opinion clearly require that we deny enforcement.

[5] "A reading of their [the majority's] opinion shows that the *crucial element in their evaluation of the course of the Respondent's conduct is the wage increase which the Respondent gave its employees in October, 1954. Thus their opinion is almost entirely devoted to a consideration of that wage increase, and they have candidly admitted that the Respondent's granting of the wage increase has given them a 'final insight' into the Respondent's conduct of negotiations with the Union.* My colleagues' decision appears therefore to *affirm the Regional Director's decision not to issue a complaint on the basis of his evaluation of the Respondent's conduct preceding the October 1954 wage increase.* And I, too, agree that but for the wage increase there would be no case whatever against the Respondent. But *as this case turns on the wage increase, the critical issue is whether the wage increase—which occurred after the Union filed its charge, and which was not made the subject of a second, or amended, charge—may lawfully be made the basis of a finding that the Respondent violated the Act.* In my opinion, it may not.

"* * *

"The Courts of Appeals for the Seventh and Fifth Circuits have held respectively, in the *Indiana Metals* [*Indiana Metals Products Corp.* v. *N. L. R. B.*, 7 Cir., 1953, 202 F. 2d 613] and *Newton* [*N. L. R. B.* v. *Newton*, 5 Cir., 1954, 214 F. 2d 472, 475] cases, that Section 10 (b) precludes the finding of an un-

An understanding of the significant facts with which we are dealing requires that a few decisive dates be kept in mind. May 20, 1954, the Union filed its charge of unfair labor practices, naming November 21, 1953 as the date of their beginning (in recognition of the 6 months period provided in the statute). At the time the charge was filed, eleven bargaining sessions had been held and a wage increase had been given certain employees effective April 19. July 13, the Regional Director refused to issue a complaint based upon this charge, and July 31 the Union filed a written request for review of this refusal, which the dissenting member treated as an appeal to the General Counsel. November 20, the Company posted a notice withdrawing its recognition of the Union as bargaining agent, preceded by the general wage increase of October 7. January 24, 1955, the Regional Director withdrew his refusal to

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fair labor practice predicated on acts that occurred subsequent to the filing and serving of a first charge and more than 6 months prior to the filing and serving of an amended charge, even though the acts in question were similar to those alleged in the charges. * * *

"In the instant case, *the Respondent's October 1954 wage increase occurred about 5½ months after the charge was filed, and almost 10 months before the complaint issued.* The October wage increase—*which according to the majority is the nub of the case* against the Respondent—was never made the subject of a second or amended charge. Accordingly, even if the complaint herein be regarded as a substitute for such a second or amended charge, the Board is, by virtue of Section 10 (b), and under the holdings of the *Indiana Metals* and *Newton* cases, *precluded from predicating a violation of the Act on the basis of that October wage increase.* This conclusion is impelled by the language of Section 10 (b) for, as the Court said in the *Newton* case, '*Without the limitation, we have placed on Section 10 (b) of the Act, its provisions would be rendered meaningless to a great extent.*'" [Emphasis added.]

issue the complaint and followed this action with the issuance of a complaint August 17, 1955. Eight bargaining sessions had been held between the date of the filing of the charge and the date of the issuance of the complaint.

The charge signed by Ralph Cox, international representative for the Union, was made out on a printed form and we quote in the margin the contents of the charge under the printed heading "Basis of the Charge."[6] The complaint, issued about fifteen months thereafter and based on the charge of May 20, begins with the statement: "It having been charged by American Federation of Grain Millers * * * that Respondent has engaged in and is now engaging in certain unfair labor practices * * * the General

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[6] "On or about November 20, 1953, it, by its officers, agents and employees, refused to bargain collectively with the authorized agents of American Federation of Grain Millers, AFL, chosen by a majority of its employees at its plant to represent them for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

"On or about the dates set opposite their respective names below, it, by its officers, agents and employees, terminated the employment of: Tony Polk, April 23, 1954; Clyde Gordon, April 23, 1954; W. M. Morris, April 24, 1954; Onnie Ray, April 24, 1954, because of their membership and activities in behalf of American Federation of Grain Millers, AFL, a labor organization, and at all times since such dates it has refused and does now refuse to employ the above named employees.

"By the acts set forth in the paragraphs above, and by other acts and conduct, it, by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

Counsel * * * hereby alleges as follows."[7] Both the complaint and the notice of hearing referred to the charge of May 20, 1954, and a copy of that charge was therewith served upon Respondent.

In summary, therefore, the determinant facts are these: May 20, 1954, the Union filed a charge of unfair labor practices based upon Respondent's actions during the six months preceding that date. The Regional Director refused to file a complaint based upon that charge and those actions. Fifteen months after the charge had been filed, the Regional Director issued and served the complaint before us purporting to be based upon it, but setting up, as the only factual recital of an unfair labor practice, a wage increase granted $4\frac{1}{2}$ months after the filing of the charge. Based upon this wage increase of October 7 and the ensuing withdrawal of recognition of the Union, the Trial Examiner and the Labor Board concluded that Respondent had failed to bargain in good faith with the Union. It is perfectly plain, as set out in the dissenting member's language quoted *supra,* that, without these happenings more than four months after the filing of the charge, the order before us would not have been entered—in fact, the complaint would not have been issued.

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[7] "8. On or about November 21, 1953, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph 5.

"9. On or about October 7, 1954, Respondent, without notice to the Union, put into effect a general wage increase for all employees in the unit described above in paragraph 5.

"By the acts described in paragraphs 8 and 9, Respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (5) of the Act."

We think the order was not justified by, but was in plain disregard of, the statute which alone vested the Board with authority to act:

> "Whenever it is charged that any person *has engaged in or is engaged in any such unfair labor practice,* the Board * * * shall have power to issue and cause to be served upon such person a *complaint stating the charges in that respect,* and containing a notice of hearing before the Board * * *: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon * * *" [Emphasis added.] 29 USCA § 160 (b).

Since the authority of the Board derives solely from the statute, it is clear that effective action can be taken only when the machinery set up by the statute is substantially followed. It is further clear that a charge must set up *facts* showing an unfair labor practice as defined in 29 USCA § 158, and the *facts must be predicated on actions which have already been taken.* When the Board is satisfied that the facts contained in the charge have been substantiated, it or its agents then have power to issue and serve upon the person charged with the improper action "a complaint stating the charges in that respect." This language can have no meaning except that the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge.

Assuming that another charge could have been filed embracing the happenings of October and November, 1954, or the original charge amended to include them, it was not proper for the Board to proceed on the basis of the charge of May 20, 1954 and enter the order here before us bottomed upon actions taken more than four months later.[8] That this is what it did is exemplified by what the Board said was the issue it was trying: "The issue before us is whether the Respondent, in this long course of dealing with the Union, fulfilled its duty to negotiate in good faith so as to justify its refusal in November 1954 to prolong the discussion of collective bargaining issues, or whether on the other hand it evaded its legal duty and was thus without warrant in November 1954 and thereafter for refusing to meet with the Union." Substantially eight of the eleven pages constituting its decision are devoted to a discussion of what transpired in September, October and November.[9] If

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[8] Respondent, by timely motions and continuing objections, tried without success to limit the decisive period to the six months covered by the charge.

[9] The Trial Examiner also devoted the greater part of his report and findings to a discussion of the company's right to break off negotiations with the union. This paragraph epitomizes his concept of what was before him:

"An important question here is whether or not the records reflect a refusal on the part of the Respondent to bargain at a time when it was honestly at an impasse with the Union and was fully convinced that the Union no longer represented a majority of the employees in the bargaining unit, or whether the Respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority status. The critical question is whether under the circumstances of this case the employer was entitled to with-the Board could thus adjudicate the rights of the parties on such subsequent actions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent *carte blanche* to expand the charge as they might please, or to ignore it altogether.

The Board predicated its authority to try the charge on the issues thus defined by it, on our case of *N. L. R. B.* v. *Anchor Rome Mills,* 1956, 228 F. 2d 775. We do not agree that the cases are apposite. *Anchor* involved refusal of the employer to hire and keep 346 named persons who had engaged in a strike against it. Two charges were filed by the union, one in November 1949, and the other in May 1950, and both were couched in very broad terms. The complaint filed by the General Counsel averred that, at all times since the first date charged, Anchor had refused to employ the named persons because of their activity on behalf of the union and because they had engaged in the strike.

The Board relied upon our quotation there from a decision of the Seventh Circuit in *N. L. R. B.* v. *Kohler Co.,* 1955, 220 F. 2d 3, 8, that "The six month limitation refers only to acts that occur before the charge and does not prevent the inclusion of similar or related acts happening after the charge."[10] The similar and related

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draw recognition of the Union on the basis of a good faith doubt as to the Union's majority. [Citing several cases.]"

[10] What the Seventh Circuit said in the *Kohler* case, at 220 F. 2d p. 7, is worthy of note here:

> "* * * if it [the Board] gets so completely outside of the situation which gave rise to the charge that it may

acts there referred to consisted of mere repetitions of applications by the former employees named in the charges which had been made within the two six-month periods covered by them.[11]

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be said to be initiating the proceeding on its own motion, then the complaint would fall as not supported by the charge.

[11] Petitioner also relies heavily on our case of *N. L. R. B.* v. *Harris*, 1953, 200 F. 2d 656. The two cases do bear some resemblance in their facts, but the action taken in *Harris* subsequent to the filing of the several charges was merely a carrying out of what had been determined upon before the last charge was filed, and was merely the culmination, closely related in point of time, of a series of closely related happenings during the period covered by the charges.

In *Harris*, the union and the employer had negotiated for 3½ years, and in early January, 1950, it appeared that the negotiations were to be fruitful. January 7, the union advised the employer that it desired to discuss the new statutory minimum wage schedule to become effective January 25. The employer consented to meet with the union in early February, and the union pressed for a definite date, but the employer finally postponed the meeting until February 18 or 20. In the interim, the employer had raised wages and the union promptly advised that in so doing, it had breached the agreement between them and that the union would file charges. Upon receiving such advice, the employer responded that no further negotiations would be conducted "until the situation is clarified." This response was contained in a letter dated February 16, two days after the union had filed its last charge.

The basis of the Board's finding was that the employer had refused to bargain in good faith from the time it was advised, on February 10, that the union would file charges. This threat, within the ambit of the charges, caused the employer to break off negotiations, but notice of its action was deferred until two days after the last charge was actually filed. The Board held that this two-day delay, under the circumstances, was not fatal to the right of the Board to pass upon the action then taken. Our opinion states that further wage increases and work benefits were made by the employer subsequent to Feb-

We do not have any similar situation here. This charge grew out of the seven bargaining sessions held between November 21, 1953 and May 20, 1954. Neither the Trial Examiner nor the Board found, and the evidence does not reflect, that any lack of good faith was practiced during that period. The parties had discussed at length, paragraph by paragraph, a contract proposed by the Union; and Respondent had also submitted its own version of a contract. The question of seniority was discussed at six of the meetings, vacations at five, arbitration at three, duration of the contract at one, overtime at two, shifts at four, holidays at three, grievances at two, and wages at five of the meetings during the six month period.

The limited raise in wages of April 19 was the result of the discussions between the parties and was initiated by the Union.[12] While the Union representatives testified that they did not think they were notified of this wage increase, it is clear that the Company

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ruary 16, the time lapse not being indicated. At all events, it was the break, actually consummated before the last charge was filed but confirmed in writing two days after, which lay at the base of the Board's decision, which we affirmed. The difference between that case and this one is too apparent to require elaboration.

[12] Cox, the Union's negotiator, testified: "I asked the company to take a look at the wage rate in the feed mill, that it appeared to me that there was too many classifications on the $1.36 rate, that it seems to me there was a need for some wage adjustment on those classifications. I asked them to look at it and consider it so we could discuss it at the next meeting."

The quoted testimony referred to the meeting of April 8. At the next meeting on April 22, the Company complied with the Union's request that the wage adjustments be then discussed by advising that it had considered the Union's suggestions and had made the adjustments as requested ranging from two to five cents per hour to some of the employees of the feed mill, same to be effective as of April 19.

merely adopted the Union's proposal in making these minor adjustments. At all events, the Union made no objection or protest to what was done, and did not list this wage adjustment as an unfair labor practice when, within about four weeks, it filed its charge setting forth its grievances against the Company.

This Court has given a clear indication of the limitations surrounding the reception of evidence of transactions outside the six month statutory period, *N. L. R. B.* v. ***I. B. S. Mfg. Co.,*** 1954, 210 F. 2d 634, 636–7:

> "He [the Trial Examiner] also agreed with the general counsel that evidence of events antedating the six months period could properly be offered and considered as *background evidence* in determining whether respondents had violated the Act * * *
>
> "* * * It is one thing to hold, as we have done, that it is admissible to add two or three names to the list of dischargees *after the period,* or to otherwise *amplify and expand a charge by the addition of details* in line with its general substance. It is quite another thing to hold that *an entirely new and different cause of action* based on matters occuring more than six months before the cut-off date for the filing of the charge may be asserted." [Emphasis added.]

These words of Chief Judge Hutcheson are in keeping with what we held in *N. L. R. B.* v. *Newton,* 1954, 214 F. 2d 472, where we quoted at length (at pages 474–475) from the Seventh Circuit case of *Indiana Metal Products Corp.* v. *N. L. R. B.,* 1953, 202 F. 2d 613, 619, and is consonant with our recent holding in No. 16662, ***White et al.*** v. *N. L. R. B.,* Apr. 23, 1958, rehearing denied May 29, 1958, * * * F. 2d * * *

What the Trial Examiner and the Board have done in the case before us is to issue an order against

Respondent based upon its withdrawal of union recognition more than four months after the filing of the charge in the course of which a general across-the-board wage increase was granted. If the Union desired this issue to be placed before the Board, it had substantially ten months before the complaint was issued in which to file a new or an amended charge. For some reason the Union chose not to do this, and the Board and its agencies were without power under the law to do it for them, or to consider it as having been done. No serious argument is made that the order is, or could be, based upon anything happening prior to May 20, the time the charge was filed, or even prior to October 1. For these reasons, the petition to enforce the order of the Board is

DENIED.

HUTCHESON, C. J., Concurring:

Were the only question in this case whether the record as a whole supports the Board's finding that, as charged by the Union and alleged in Par. 8 of the complaint, respondent refused to bargain in good faith with the Union, in violation of Sec. 8 (a) (5) (1) of the Act, I would content myself with concurring in the view of the majority that, under settled law, *NLRB* v. *American National Insurance Co.,* 343 U. S. 395, it does not.

In view, however, of the issue discussed in the opinion of the Board and that of its dissenting member and in the majority opinion and that of the dissenting judge of this court, whether the Board's opinion, that the charge was proved, was incorrectly based on matter not properly before the Board because it was not embraced in the charge, and because I agree with the dissenting member, I have concluded to point out briefly why I think that the Board majority was wrong, the dissenting member right.

First, it is to be noted that *in the charge against employer* filed by the Union on May 20, 1954, Rec. p. 19, 20 and 21, only two violations were charged. One of these was that on or about November 20, 1953, respondent refused to bargain collectively with the Union. The other was that on or about April 23 and April 24, 1954, the dates named in the charge, certain employees were discriminatorily discharged.

Second, it will be noted that, while paragraph 8 of the complaint, record p. 88, alleges, as was charged in violation No. 1 of the charge, that on or about November 20, 1953, respondent refused to bargain, violation No. 2 of the charge, the discriminatory discharges of employees complained of, was not alleged.

Third, and this is the crux of the matter, paragraph 9 of the complaint, alleging:

> "On or about Oct. 7, 1954, [a date five months after the filing of the charge], respondent, without notice to the Union, put into effect a general wage increase for all employees in the unit described above in par. 5."

undertakes in effect without any charge supporting it to complain of a violation having no connection with or relation to the two violations charged to have occurred before the charge was filed. The result is that the examiner, the majority of the Board and the dissenting judge in this court have been led to find a violation of the matter charged in paragraph 9 of the complaint, on the specious claim that the matter so alleged was supported by the charge. In saying this, I agree with the dissenting member of the Board that but for this allegation, unsupported by any charge and for the proof that came in under it, there was, there could be, no reasonable basis for the finding of the

Board. Without aid from this source, in short, the Board's finding, that the respondent did not bargain in good faith, runs directly counter to the teachings of the statute, the American National Insurance Company case, *supra,* and all the cases following in its train, including *White* v. *N. L. R. B.* (5 Cir.) * * * F (2) * * * April 23, 1958. In short, what has happened here is that by the device of injecting into the case entirely new matter completely unrelated to the charge, the regional director, in violation of the provisions of the Act, that no complaint can be filed except one based upon a charge, has filed a complaint, and the Board has heard and condemned the respondent in respect of matters which, because of the lack of a charge, were not before it. In my opinion, none of the cases cited and discussed support the Board's finding, and I concur in denying enforcement.

RIVES, *Circuit Judge,* Dissenting:

According to my view, substantial evidence on the record as a whole amply supports the Board's finding that respondent refused to bargain in good faith with the Union in violation of Section 8 (a) (5) and (1) of the Act. Keeping in mind the date on which the charge was filed, and with the strictest possible application of the Section 10 (b) limitation, the following occurred between November 21, 1953 and May 20, 1954: (*A*) Respondent's negotiators functioned under instructions from its president that they were not to yield in any respect on three important matters: (1) Seniority was not to be the sole factor governing promotions. (2) The contract must not contain an arbitration provision. (3) The contract must contain a no-strike clause with a monetary penalty for its breach. Restrictions (2) and (3) are especially important when considered together. Respondent could not in good faith demand that the Union surrender its statutory right to strike and at the same time refuse to agree upon some other effective method of securing a review of grievances. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers* v. *Lincoln Mills,* 1957, 353 U. S. 448, 455. By thus circumscribing the authority of its negotiators, the respondent effectively prevented any bona fide bargaining. (*B*) The Union repeatedly requested the respondent to furnish it with a list of employees together with classifications, wage rates, and employment dates, and the respondent supplied a partial list only, and continually failed to live up to its promise to supply other such relevant data. *National Labor Relations Board* v. *Item Company,* 5th Cir. 1955, 220 F. 2d 956. (*C*) On April 19, 1954, respondent put into effect wage adjustments at its feed mill admittedly without consulting the Union, and thereby clearly showed that it was merely going through the motions of collective bargaining. *Armstrong Cork Co.* v. *National Labor Relations Board,* 5th Cir. 1954, 211 F. 2d. 843, 847; *National Labor Relations Board* v. *H. G. Hill Stores,* 5th Cir. 1944, 140 F. 2d. 924, 926. The foregoing, along with a number of other practices noted in the Examiner's Report and in the Board's Decision, occurred within the most rigid concept of the six-month period prior to the filing of the charge. Without reference to subsequent events. I think that the foregoing furnishes substantial evidence to support the Board's finding that respondent refused to bargain in good faith.

The charge is no part of the pleadings in the case. It precedes the filing of the complaint, and has for its purpose the setting in motion of a preliminary investigation to determine whether or not a complaint based upon such charge should issue. *National Labor Relations Board* v. *Westex Boot & Shoe Co.*, 5th Cir. 1951, 190 F. 2d. 12. The charge need not, as the majority implies, be restricted to *"actions which have already been taken."* To the contrary, the charge required by Section 10 (b) of the Act is "* * * that any person has engaged in *or is engaged in* any such unfair labor practice, * * *." (Emphasis supplied.) Accordingly, on May 20, 1954, the Union charged that the respondent "has engaged in *and is engaging in* unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act." (Emphasis supplied.) "Is engaging in" carried the time element up to the filing of the complaint. The complaint alleged that respondent had unlawfully refused to bargain on or about November 21, 1953, *"and at all times thereafter."* (Emphasis supplied.) It was entirely proper, I think, for the complaint to include such conduct occurring after the charge. *National Labor Relations Board* v. *Harris*, 5th Cir. 1953, 200 F. 2d 656, 658; *National Labor Relations Board* v. *Anchor Rome Mills*, 5th Cir. 1956, 228 F. 2d. 775, 779; *National Labor Relations Board* v. *Local 1423, United Brotherhood of Carpenters, etc.*, 5th Cir. 1956, 238 F. 2d. 832, 836. With deference, the contrary construction of Section 10 (b) by the majority seems to me excessively technical and restrictive, and, if sustained, I believe that it will seriously cripple the Board in any effective enforcement of the Act.

On October 7, 1954, the respondent granted a general wage increase to its employees which the majority concedes was "without specific notice" to the Union representatives, but states that it was "after discussion" with them, and was also after the respondent had "concluded that the Union no longer represented a majority of its employes." On both of those statements I disagree, and find the facts to be accurately stated in the parts of the Board's brief quoted in the margin.[1]

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[1] "In the latter part of September respondent's president, without consulting the Union, decided to grant a general wage increase of seven cents per hour and informed the mill supervisors of his decision (R. 119–120; B. A. 66–68, 73). On October 4 or 5, Union negotiator Wellborn stated to Martin, respondent's vice-president, 'I hear that you have given a seven cent raise to the employees.' When Martin admitted this, Wellborn asked, 'Aren't you aware that you should have contacted or told me or discussed it with me about giving the employees a raise.' Martin's reply was that seven or eight years earlier, when he was employed elsewhere, he had given wage increases without contacting Wellborn and that the latter had made no objection. (R. 120; B. A. 58–60, 63–64). On October 6, respondent posted a notice officially announcing the wage increase, which was made retroactive to October 4. Admittedly, respondent gave the Union no prior notice of this action (R. 120, 165, 175; B. A. 63–64, 68–73, 292).

"The meeting scheduled for October 10 was in fact held on October 15 (R. 161–162). * * *

"The next, and final, meeting was not held until November 19. On that date, respondent stated that it felt that the Union was not interested in a contract and that it had received 'information from what the mill considers to be accurate reliable sources' that the Union no longer represented a majority of the employees in the bargaining unit. Respondent accordingly for the first time advised the Union that 'we just simply at this time do not recognize the Union as the bargaining agent for the employees at the plant' and that it was 'refusing to bargain any further' (R. 121, 162; B. A. 20, 286, 289, 292). Prior to this meeting, the Union's majority had not been questioned (B. A. 21). The Union asked the source of the information regarding its alleged loss of majority, and respondent replied 'Just by word of mouth' (B. A. 21, 290).

"On the same day, respondent publicly announced its withdrawal of recognition in a notice posted on a plant bulletin board (R. 121, 166; B. A. 2–23, 108–109). In a letter trans-

I think that the Board had a right to consider the October 7, 1954, general wage increase and the November 19, 1954, express withdrawal of recognition from and refusal to continue to meet with the Union. When those acts are considered, it is not even debatable that the Board's finding that respondent refused to bargain in good faith with the Union is supported by substantial evidence on the record as a whole. The proof, indeed, goes beyond any reasonable doubt. I therefore respectfully dissent.

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mitting a copy of this notice to the Union, respondent stated that 'the information which the Company had, with reference to the desire of its employees [not to be represented by the Union], came through verbal statements of the employees' (*ibid*)."

JUDGMENT

Extract from the Minutes of August 1, 1958.

No. 16953

National Labor Relations Board
versus
Fant Milling Company

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an Order of the National Labor Relations Board, made on April 19, 1957 in the proceeding known upon the records of the Board as Case No. 16–CA–752, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that said petition for enforcement be, and the same is hereby, Denied.

"Hutcheson, *Chief Judge,* concurring."

"Rives, *Circuit Judge,* dissenting."

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No. 482

In the

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
FANT MILLING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix "A" to the petition and is reported at 258 F. 2d 851. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 117 NLRB No. 168 page ..... and appear in the record heretofore filed by Petitioner. (R 117-183)[1]

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[1] "R" refers to the transcript of record, "BA" to the appendix of the Board's brief in the Court of Appeals, "RA" to the appendix to Respondent's Brief in the Court of Appeals, "BB" refers to the Brief of Petitioner.

JURISDICTION

Jurisdictional requisites are stated in the petition. However, the question presented to the Court by the Petitioner is not the question determined in this case by the Board and the United States Court of Appeals for the Fifth Circuit and is not properly before the Court.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board can base an order on transactions occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, where such transactions are not embraced in or contemplated by the charge.

2. Whether the Regional Director for the National Labor Relations Board has authority to direct the issuance of a complaint subsequent to his refusal to do so and subsequent to appeal to General Counsel for the National Labor Relations Board while such appeal is pending before General Counsel without General Counsel having taking any action on such appeal, all contrary to the Board's published Rules and Regulations and Statement of Procedure.

STATEMENT

The salient facts germane to the questions before the Court can be stated concisely as follows:

1. Following the union being certified as the bargaining agent of respondent's employees, negotiation conferences commenced during August of the year 1953, (BA 104);

2. After several meetings, on May 20, 1954, the union filed its one and only charge against Respondent charging it with having refused to bargain on or about November 20, 1953, being a date more than six months prior to the filing of the charge, (R 19-22);

3. On July 13, 1954, the Regional Director for the Board issued its decision by which it refused to issue a complaint, (R 25-26);

4. On August 31, 1954, the union made a request for review of the Regional Director's decision and appealed such decision to General Counsel, (R 27-79);

5. On October 6, 1954, Respondent announced a wage increase retroactive to October 4, 1954, after having told the union negotiator on October 4 that such wage increase would be put into effect, (RA 3-5, 2);

6. While this matter was on appeal, before General Counsel acted thereon, and while the Office of General Counsel was vacant, the Regional Director attempted to withdraw his earlier refusal to issue a complaint, such attempt being made on January 24, 1955, (R 80-81);

7. On August 12, 1955, for the first time, General Counsel notified the parties that he had been advised that the Regional Director was withdrawing his earlier refusal to issue a complaint with respect to the charged violation of Section 8(a)1 of the Act and affirmed the Regional Director's dismissal of the charged violations of Sections 8(a)1 and 8(a)3 of the Act, (R 82-83);

8. On August 17, 1955, the Regional Director issued a complaint against Respondent, the gravamen of which was that Respondent had on or about November 21, 1953, and October 7, 1954, refused to bargain in violation of the Act, (R 84-89);

9. On November 19, 1954, more than 12 months subsequent to certification, Respondent advised the union that it no longer recognized it as the bargaining agent of its employees because it believed a majority of its employees did not desire to be represented by the union, (BA 109);

10. On April 19, 1957, the Board issued its decision in which it decided the issue of whether or not Respondent was justified in withdrawing its recognition of the union on November 19, 1954, (R 118);

11. The Board found that Respondent had during October 1954 unilaterally granted a wage increase and was thereby not justified in withdrawing its refusal to recognize the union on November 19, 1954, (R 119);

12. On August 1, 1958, the United States Court of Appeals, Fifth Circuit, properly denied enforcement of the Board's order for the reason that the order was based upon Respondent's withdrawal of union recognition more than four months after the filing of the charge and this matter had not been placed in issue by the filing of an amended charge by the union and the Board and its agencies were without power to do it for them, (Pages 30-31, Board Brief; *258 F. 2d 857-858*).

Petitioner directs most of his petition to matters anterior to the October wage increase and matters related to the substantial evidence rule, and some of Petitioner's statements in this connection are incorrect whereby Respondent feels compelled to call the inaccurate statements, though irrelevant, to the Court's attention.

First, the statement of Petitioner to the effect that Respondent's committee was instructed by its President that the contract must not contain a no-strike clause with a monetary penalty for its breach and not provide for arbitration or for seniority being the sole governing factor in promotions or layoffs is taken from a cold record out of context and does not reveal the true facts. Respondent's President did not participate in the negotiations. He delegated this authority to other members of his organization. (RA 22) He instructed them as to his desires concerning the contract and such was the import of the testimony relied upon by Petitioner in contending that Respondent's contract negotiators did not have full bargaining authority. (RA 18) All matters properly subject to bargaining were fully discussed. Respondent's contract negotiators had full and unlimited authority to bargain on all matters. (RA 22)

Second, Petitioner has incorrectly stated that Respondent did not furnish classifications, wage rates and dates of employment of its employees. While the information might not have been as complete, or in the form the union wanted it, Respondent did furnish to the union such information as it had in this regard. (BA 10, 141-142) Respondent, in its proposal, presented to the union in April 1954 listed job classifications and wage rates of plant employees. (RA 53-55; BA 100-102)

Third, Petitioner has incorrectly stated that in April 1953 this Respondent unilaterally put certain wage adjustments into effect for some of its employees. The record clearly shows that a wage adjustment was made in the course of negotiations during April 1954 at the insistence of the union, with the union's full permission and knowledge. (BA 61-62; 207; BB 29-30)

Fourth, while, as Petitioner states, at the October 15, 1954 negotiation conference, the wage increase Respondent had announced on October 6, 1954, effective October 4, 1954, was discussed, such wage increase was not unilateral. The union negotiator, Wellborn, testified that he was told of the increase on October 4 or 5, 1954. (RA 3-5) No objection was made by him to the proposed increase. (RA 21) The wage increase was but an adjustment by the company in keeping with its established policy of paying its employees wages comparable with those in the area, which policy was well known to the union. (BA 282)

The remaining portions of Petitioner's statement are substantially accurate, though incomplete and not germane to the questions before the court.

ARGUMENT

A. The Decision Below Is Correct.

It is clear and plain that the real question decided by the Board and the Court below, and the only question that is properly here before the court is whether or not the Board has authority to issue an order based on alleged transactions occurring more than four months subsequent to the filing of a charge and ten months prior to the issuance of a complaint where such transactions are not embraced in or contemplated by the charge, and regardless of whether or not the complaint was properly issued.

The Petitioner now, as in the Court below, seeks to divert the Court's attention from the real question in issue and argues that Respondent refused to bargain in good faith up to and prior to the filing of the charge. The Board, in its decision, stated in effect that the decision was based upon a finding that Respondent had unilaterally granted a wage increase in October 1954 and had unlawfully withdrawn recognition of the union in November 1954. (R 118, 126, 130) In fact, the Regional Director, as late as July 13, 1954, advised the parties that there was insufficient evidence of violations to warrant further proceedings. (R 251, 129) It was not until January 24, 1955, while the refusal of the Regional Director to issue a complaint was on appeal to General Counsel, that the Regional Director, upon his own volition, advised the parties that he was withdrawing his refusal to issue the complaint and would as to the allegations of violation of Section 8(a)5 of the Act proceed with investigation under the charge that had been filed on May 20, 1954. This came about subsequent to the October 1954 wage increase and November 1954 withdrawal of recognition which Petitioner in its decision and before the Court below conceded to be the basis of its decision.

Respondent urged in the Court below that, in any event, the order of the Board was not supported by substantial evidence. The Court of Appeals did not disagree with this contention and denied enforcement for other reasons, saying, however, "there is not in the record more than a hint of anything improper until after October 1". (BB 20) Further, Chief Judge Hutcheson in his concurring opinion held that the record as a whole did not support the Board's finding that Respondent had refused to bargain in good faith. (BB 31)

The Court's decision denying enforcement is well supported by a long line of authority. The National Labor Relations Act does not require the signing of a contract upon any specific terms, it requires bargaining not capitulation. *NLRB v. American National Insurance Company, Sup. Ct. 1952, 343 U. S. 395, 72 Sup. Ct. 824.* The Board concedes in its order and in its brief before the Court below that without injecting into this case entirely new matter, i.e., the October 1954 wage increase and November 1954 withdrawal of union recognition, completely unrelated to the charge, the substantial evidence rule is not met. (BB 32-33; R 119, 130-131) There is much authority to support the holding of the court below that these new matters can not be used to form the basis of an order against Respondent. *N. L. R. B. v. I. B. S. Manufacturing Company, et al. (C. A. 5, 1954), 210 F. 2d 634, 637; Indiana Metal Products Corporation v. N. L. R. B. (C. A. 7, 1953), 202 F. 2d 613, 619; N. L. R. B. v. Newton (C. A. 5, 1954), 214 F. 2d 472, 474;* and *Section 10(b) of the National Labor Relations*

Act. On the other hand, there is no authority to support the position of Petitioner.

B. There is No Conflict of Decisions.

The decision of the court below is correct. It is not in conflict with any decision known to Respondent. Petitioner states there is a conflict of decisions and uses such as the basis for requesting this court to grant a writ of certiorari. This statement of Petitioner is incorrect. Petitioner states the decision of the court below conflicts with the holding of the Third Circuit in *National Labor Relations Board v. Epstein, 203 F. 2d 482, 485, certiorari denied 347 U. S. 912*, and with the holding of this court in *National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 367-369*. This statement is also incorrect. There is no conflict with these decisions.

In the *National Licorice* case (supra), decided by this court, the employer was charged with attempting to coerce its employees into signing individual contracts and attempting to compel employees to form committees not of their own choosing for bargaining purposes. An amended charge was filed therein on August 2, 1937, alleging the same matters. On October 2, 1937, the Board issued a complaint alleging that the employer had engaged in such practice down to the date of the filing of the complaint. The employer objected to including in the complaint these same violations down to the time of filing the complaint. This court held that the Act did not preclude the Board from dealing with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. In this connection this Court said:

> "the violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken."

As this court can readily see, the *National Licorice* case is not analogous to the fact situation here before the court for two reasons. The first of these reasons is that the November 1954 refusal by Respondent to recognize the union as the bargaining agent for its employees and the October 6, 1954 wage increase are not continuations of any unfair labor practice alleged in any charge filed against Respondent. The only charge filed against Respondent alleged that Respondent, on or about November 20, 1953, refused to bargain in violation of the Act. There was no allegation in the charge that Respondent refused to bargain at any other time or continued its action beyond that date. In fact, the date of November 20, 1953, is more than six months prior to the filing of the charge and does not and did not invoke the jurisdiction of the National Labor Relations Board. In any event, the November 1954 and October 1954 events, upon which Petitioner relies, are not a part of a continuing allegation contained in the charge, such as was involved in the *National Licorice* case. A charge of a refusal to bargain is not of itself a continuing offense. *American Federation of Grain Millers v. N. L. R. B. (C. A. 5, 1952), 197 F. 2d 451, 454.* In those cases with which Respondent is familiar, that have permitted unfair labor practices occurring subsequent to the filing of the charge to stand as a basis for entering an order against an employer, the charge alleged a refusal to bargain on a certain date together with all times after such date and the subsequent events considered were closely related in point of time and substance. *N. L. R. B. v. Harris, 200 F. 2d 656, 658; N. L. R. B. v. Anchor Rome Mills, Inc., 228 F. 2d 775,* both decided by the Fifth Circuit Court of Appeals and both relied upon by Petitioner in the court below and *N. L. R. B. v. Epstein, 203 F. 2d 482,* relied upon by Petitioner in this Court. The November 1954 and October 1954 incidents, while not constituting a violation of the Act were never within the jurisdiction of the Board. The jurisdiction of the Board was not invoked with regard thereto and the Board could not look to such incidents as forming a basis for an order against Respondent.

Secondly, the *National Licorice* case is not authority for the position of Petitioner because the same was decided in the year 1940, long prior to the 1947 amendment to the National Labor Relations Act whereby Section 10(b) was added to the Act precluding the issuance of complaint based upon any charge alleging that an unfair labor practice had occurred more than six months prior to the filing of the charge. The only alleged unfair labor practice set out in the charge as occurring within the six-month limitation period as provided by this Section of the Act, had to do with alleged violations of Section 8(a)3 of the Act. All of these portions of the charge were dismissed and no complaint issued thereon. The portion of the charge, upon which the complaint issued, charged Respondent with violation of Section 8(a)5 of the Act by having refused to bargain on a date more than six months prior to the filing of the charge. Thus, the complaint was issued in violation of Section 10(b) of the Act from its outset. Nevertheless, the complaint was not filed until August 17, 1955. This is ten months subsequent to the October and November 1954 incidents. To now hold that the complaint relates back to the time of the filing of the charge and that all matters occurring between the filing of the charge and issuance of the complaint were in issue before the Board, notwithstanding that such incidents occurred subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, renders Section 10(b) of the National Labor Relations Act a complete nullity. To so hold, would but lead to the inescapable conclusion of unions keeping on file continuously a charge of a general nature so as to forever preclude the use of Section 10(b) of the Act. Such a decision is contrary to the Act and constitutes legislative rather than judicial action. The statement of Petitioner to the effect that the language of Section 10(b) of the Act and its legislative history show that it was designed to govern violations prior to the filing of a charge and not subsequent violations, irrespective of time and subject matter, is without support and is not sound.

Respondent does not have available the Senate Report referred to by Petitioner but the House Report does not support such statement. Congress made it clear in its report and in the language of the statute that no complaint shall issue on any matter occurring more than six months prior to the filing of the charge. *U. S. Code Congressional Service 80th Congress, Page 1159.* To hold otherwise, as Petitioner seeks, evades the plain dictates of Congress. As the court below stated, if the union had wanted Respondent's withdrawal of its recognition of the union in November, 1954, and the wage increase of October 6, 1954, in issue, it could have put them in issue by filing an amended charge. This it chose not to do. The Court's attention is also called to the fact that the complaint with which we are here concerned issued more than six months subsequent to the alleged actions of Respondent upon which Petitioner relies.

It is clear that the 1940 decision of this Court in the case of *National Licorice Company v. National Labor Relations Board* (supra) is not authority for the position of Petitioner.

It is equally clear that the decision of the court below is not in conflict with the case of *N. L. R. B. v. Epstein, 203 F. 2d 482.* In the *Epstein* case a charge of a refusal to bargain was filed on September 28, 1949. On April 2, 1950, the union filed an amended charge. There was no amended charge filed in the instant case. In the *Epstein* case, the Court held that the amended charge related back to the date of the original charge. The question was raised in the

Epstein case of the amended charge being filed more than six months subsequent to some of the incidents there involved. The court held in the *Epstein* case that the subsequent events were but continuations of a continuing violation that was alleged in the original charge. While it does not constitute a holding of the Court, inasmuch as the question was not involved, the Third Circuit did state in the *Epstein* case by way of dictum, "* * * even without the amended charge we think the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of and in pursuance of the same objects. *National Labor Relations Board v. Harris, C. A. Fifth Circuit, 1953, 200 F. 2d 656.*"

This dictum does not support the position of Petitioner herein inasmuch as no continuing violation was alleged against this Respondent in the charge upon which Petitioner relies.

Thus, for two reasons, the decision of the court below is not in conflict with the *Epstein* case. The first of these reasons is that in the *Epstein* case an amended charge was filed. This was not done in the instant case. The second reason is that the original charge in the *Epstein* case alleged a continuing violation. This was not done in the instant case.

There is no conflict of decisions and no reason exists for this court to grant the writ requested. To the contrary, the decision of the court below is in conformity with other decisions previously rendered. *N. L. R. B. v. Newton (C. A. 5), 214 F. 2d 472; Indiana Metal Products Corporation v. N. L. R. B. (C. A. 7), 202 F. 2d 613.* Both arrive at the same holding as did the court below. In both of those cases it was held by the Circuit Court of Appeals that in matters where an amended charge was filed, the Board was precluded from entering a finding of a violation of the Act as to all matters occurring subsequent to the filing of the original and more than six months prior to the filing of an amended charge, wherein the original charge was not one of a continuing violation. The court below has not gone this far in the instant decision. The court below has but held, where no amended charge was filed, the Board could not look to events occurring subsequent to the filing of the original charge and more than six months prior to the issuance of the complaint as forming a basis for a finding that the employer had violated the Act, wherein no continuing violation was alleged and the acts complained of were not contemplated by or encompassed in the charge. Such is the plain intent of Section 10(b) of the Act. To hold otherwise is to circumvent and render a nullity, this action of Congress and puts the Court in the field of the Legislative rather than the Judiciary.

Each of the other cases referred to by Petitioner are not in point. The cases of *N. L. R. B. v. Kobritz, et al., 193 F. 2d 8; N. L. R. B. v. Kingston Cake Company, 191 F. 2d 563; Kansas Milling Company v. N. L. R. B., 185 F. 2d 413; N. L. R. B. v. Gaynor News Co., 197 F. 2d 719* and *N. L. R. B. v. Kohler Company, 220 F. 2d 3,* relied on by Petitioner, each involve question of amended charges relating back to original charges and the authority of the Board to enlarge upon the contents of a charge so long as the enlargement has to do with the same matters set out in the charge. These are not questions here before the Court. The decision of the court below is not in conflict with these holdings.

Further, the opinion of the Court below would not hamper the Board in its enforcement of the National Labor Relations Act as argued by Petitioner. It properly restricts the Board and requires it to enforce the Act as written rather than permitting the Board to initiate action. As observed by the Seventh Circuit Court of Appeals in the *Kohler* case (supra), if the Board gets outside of the situation which gives rise to the charge it is in effect initiating the proceeding, and the complaint must fall. This is what the Board has done in the instant case and the court below properly denied enforcement.

C. Unauthorized Issuance of the Complaint.

As heretofore pointed out, the complaint herein was improperly issued because:

1. All matters in the charge within the six-month period of limitation were dismissed and the complaint was issued upon an allegation in the charge allegedly occurring more than six months before the filing of the charge in violation of Section 10(b) of the Act.

2. The Regional Director circumvented and violated the published *Rules and Regulations* and *Statement of Procedure* of the Board in the issuance of the complaint.

The first reason has previously been discussed. The complaint is clearly unauthorized because of the second reason as well. Section 102.19 of the Board's *Rules and Regulations* provides as follows:

> "If, after the charge has been filed, the Regional Director declines to issue a complaint, he shall so advise the parties in writing, accompanied by simple statements of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with General Counsel in Washington, D. C., and filing a copy of the request with the Regional Director, within ten days from the service of notice of such refusal by the Regional Director."

Section 101.6 of the Board's *Statements of Procedure* provides:

> "If complainant appeals to the General Counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of his affirmance, or may direct the Regional Director to take further action."

As heretofore pointed out, the Regional Director refused to issue a complaint upon the charge filed and appeal was taken by the union to General Counsel. While this request for review was pending before General Counsel, without General Counsel having acted thereon, the Regional Director withdrew his refusal to issue a complaint in violation of the expressed provisions of the Board's *Rules and Regulations*, its *Statements of Procedure*, and Section 3(a) of *The Administrative Procedure Act, 5 U. S. C. A. 1001 Et Seq.*

Upon the appeal being taken, the Regional Director lost all jurisdiction of the charge and could act no further until General Counsel acted thereon.

The dissenting member of the Board concurs that the Regional Director's action was clearly contrary to the Board's established procedure and that such irregular action taken by the Regional Director before the filing of the complaint was prejudicial to Respondent. (R 131-133)

CONCLUSION

By virtue of the premises, Respondent respectfully submits that the Honorable United States Court of Appeals, Fifth Circuit, properly denied enforcement of the Board Order and the Petition for Writ of Certiorari should in all things be denied.

Respectfully submitted,

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O. B. FISHER
Of Counsel.

November 28, 1958.

CERTIFICATE

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in the United States Postoffice, air mail postage prepaid, to each J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C. and Jerome D. Fenton, General Counsel of National Labor Relations Board, Washington 25, D. C. this November 28th, 1958.

O B Fisher

O. B. FISHER

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No. 482

In the

Supreme Court of the United States

OCTOBER TERM, 1958

National Labor Relations Board,
Petitioner,
v.
Fant Milling Company,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF FOR RESPONDENT, FANT MILLING COMPANY

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No. 482

In the

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OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
FANT MILLING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT, FANT MILLING COMPANY

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the record, (R. 538-552.) The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 117 N. L. R. B. 1277 and appear in the record filed herein. (R. 117-182.)

II.

JURISDICTION

Jurisdictional requisites are stated in Petitioner's brief. However, the question presented to this Court by petitioner is not the question properly before the Court.

III.

QUESTIONS PRESENTED

1. Whether or not the National Labor Relations Board can rely upon transactions occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, which are neither related to nor grow out of violations of the Act existing at the time the charge is filed, as constituting a violation of the Act and the basis of an order.

2. Whether or not the National Labor Relations Board has jurisdiction of a matter wherein the complaint is issued contrary to its published rules and regulations and the Administrative Procedure Act.

IV.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended *(161 Stat. 136, 29 U. S. C. 151 et seq.)*, appear in the brief of petitioner at pages 2-3.

The pertinent provisions of the *Administrative Procedure Act, 5 U. S. C. A. 1001 et seq.*, reads as follows:

> "5 U. S. C. A. 1002—(a) Every agency shall separister (1) descriptions of its central and field organizations including delegations by the agency of final authority and the established place at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

The pertinent provisions of the Board's *Rules and Regulations* and *Statements of Procedure*, which have been published in the Federal Register, are as follows:

> *NLRB Rules and Regulations, Section 102.12 (d)*
>
> Such charge shall contain the following:
>
> (d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.
>
> *NLRB Rules and Regulations, Section 102.19*—If, after the charge has been filed, the Regional Director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action

by filing a request therefor with the General Counsel in Washington, D. C., and filing a copy of the request with the Regional Director, within 10 days from the service of the notice of such refusal by the Regional Director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based."

NLRB Statements of Procedure, Section 101.2

Initiation of Unfair Labor Practice Cases

* * * a blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

NLRB Statements of Procedure, Section 101.6

—If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the General Counsel in Washington, D. C., within 10 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of his affirmance, or may direct the Regional Director to take further action."

V.

STATEMENT

A.

The Facts

The Respondent is a Texas Corporation, engaged in the milling of flour and the manufacture of related products with its principal place of business at Sherman, Grayson County, Texas. There has at no time been a labor dispute nor any labor difficulty at Respondent's plant. The only activity involving its employees with a labor organization at its plant was in about the year 1948 when the American Federation of Grain Millers Union attempted to organize the employees of the plant but the Union refused to sign a contract because it did not contain a vacation clause. (R. 482-483.) There were no labor difficulties at the plant on that occasion and the employees lost interest in the union and the union abandoned its efforts. (R. 483-486.) The same union returned to Respondent's plant in an effort to organize its employees in the year 1953. On June 19, 1953, an election was held in which the ballots were cast 94 in favor of the union and 85 against. (R. 190.) Respondent employs about 200 people. In due course, the union involved was certified as the bargaining agent for the employees. Subsequently, Respondent and the union met in at least 19 bargaining sessions or conferences which occurred on various dates between September 5, 1953 and November 19, 1954. The parties were unable to agree upon a contract. Many agreements were reached upon specific provisions of the contract but the parties had agreed at the outset that no agreement on a particular provision would be binding until an entire contract had been agreed to. (R. 490.) In fact, the only two provisions upon which an agreement was not reached that resulted in a contract not being signed by the union were those of seniority and arbitration. Such was the statement of the Union organizers made at the September 17, 1954 meeting. (R. 433; 514.)

During the long course of negotiations, many facets regarding a proposed contract were discussed. Respondent's President, James Fant, instructed those that were handling negotiations for the committee to negotiate a workable contract and let it be known that he did not desire a contract that contained an arbitration clause, a no-strike clause without a monetary penalty for its breach, or seniority as the sole governing factor in promotions and layoffs. (R. 232-233; 491.) President Fant at the same time instructed his committee that he wanted a workable contract negotiated. (R. 492.)

Respondent and the union bargained on all proper matters. As late as September 17, 1954 the union announced that the only matters standing in the way of a contract were seniority and arbitration. (R. 514.) During this period of time, various concessions and agreements were made, much too numerous to detail. However, Petitioner has given some distorted statements to the court in this connection (BB 4-7), and Respondent feels compelled to impose on the Court in this connection to some extent.

On request by the Union, Respondent furnished to the union its job classification and wage rates, statement of Petitioner to the contrary notwithstanding. (R. 100-103; 516-518.) Respondent did not furnish the union a seniority list during the negotiations because it did not have such available, not having a record of when each of its employees commenced work. (R. 458-459; 462-464.) Respondent offered to get for the union what information it had in this regard available, which the union was unwilling to accept. (R. 426-429.) Also, during the course of negotiations, some wage changes were made. At one of the negotiation conferences, April 8, 1954, the union made objection to Respondent having too many classifications at the same wage rate in its feed mill. (R. 207.) At the next meeting, April 22, 1954, Respondent pointed out to the Union that it would make some adjustments in its feed mill in keeping with earlier objections by the union. (R. 396-397; 517-518.) The union expressed satisfaction with this concession made by Respondent in an effort to arrive at a workable contract. (R. 546.) On October 6, 1954, Respondent put into effect a wage increase, made effective as of October 4, 1954. The union was notified of such proposed wage increase on October 5, 1954 and made no objection thereto. (R. 480-481; 494.) The wage increase was in keeping with Respondent's established policy of keeping its wages comparable with those in the area, which policy the union well knew. (R. 468-659.) Respondent desired to maintain the right to raise wages if it saw fit, feeling this was or should be a prerogative of management. However, Respondent was willing to agree to contract to pay at least the present wages during the period of the contract. (R. 281.) The union itself agreed to this proposal on April 2, 1954. (R. 281.) The Company, after the union changed its mind about this provision, suggested that a range of certain minimums and maximums be set up, which the union refused to do. (R. 509-511.) In fact, the union did not desire to and would not freely discuss wages during the long course of contract negotiations. (R. 341-342; 430; 501.)

Also, Respondent had for a few years granted a one week's paid vacation at its plant but it did not desire to contract to pay for the vacation for any certain definite period of time. (R. 244.) With regard to a no-staggered work week, Respondent did not desire to contract to such but advised the union that it might agree to it providing some offsetting advantages were set up for the company. (R. 264; 302.) Not only did the union refuse to discuss wages during the course of the contract negotiations above pointed out, but was adamant in other regards. The union announced in no uncertain terms that it was going to have an arbitration clause or else. (R. 514-515.) The union was adamant in its position with regard to a seniority clause controlling promotions, demotions, layoffs and recalls. (R. 44-48.) Respondent was willing to let seniority control in these matters when men were of equal ability. The union refused to agree. (R. 503-506; 510-511.) In fact, notwithstanding that the labor commissioner, Morrow, thought Respondent's proposal of seniority was reasonable, the union stated that it sounded like h--l to it. (R. 496-497.)

Contrary to Petitioner's statement, that during this long course of negotiations, the union conceded on many of its proposals, the union did not agree to abandon any of its proposals contained in its original contract other than the check-off clause. (R. 484.) Nor did the union at anytime submit a new proposal after submission of its original contract. (R. 485.) The union would not modify its demand for daily overtime (R. 486); it would not modify its demand for double time for Sunday work (R. 488); it did not recede from or modify its demand for two and one-half time straight time hourly pay for holiday work (R. 488); the union at no time agreed to modify its demand for four hours minimum reporting pay time (R. 489); the union would not bargain at all on liability for walk-outs (R. 496); the union refused to modify its demand for a strict seniority clause providing that length of service alone control promotions, lay-offs and recalls, etc. (R. 503-506); and as heretofore pointed out, the union absolutely refused to yield from its demand for arbitration. (R. 514-516.) At one time the union suggested that if the company would leave out the no-strike clause it would abandon its arbitration clause. (R. 401-402.) Thus, its willingness to give up the arbitration proposal was a conditional one made on April 22, 1954. However, the union abandoned this concession, if such it was, as is shown clearly by its statement made several times on September 17, 1954, that there was going to be an arbitration clause. (R. 514-516.) The same statement was made by the union at the previous bargaining conference of August 27, 1954. (R. 514.)

Respondent submits that it, during the course of the negotiations, not only met and bargained on issues, fully and completely, but conceded on various important points during the course of the negotiations. For instance, Respondent, at the insistence of the union, agreed to a different shift differential among its employees. (R. 496.) It agreed to make certain wage adjustments in its feed mill at the request of the union as heretofore pointed out, it agreed on the union's grievance procedure and a limited form of arbitration (R. 500-507), and it agreed to the holidays requested by the union. (R. 264; 282; 500.) Respondent was willing to give certain reporting in and call back pay. (R. 522-523.) It conceded to give certain reporting time and reporting pay to truck drivers. (R. 523-525.) Respondent expressed a willingness to yield its demand for the right to raise wages so as to make such within cretain maximum and minimum ranges. (R. 508-509.) Thus, while no agreement was reached, certainly Respondent engaged in the bargaining processes in good faith toward reaching an agreement.

B.

The Charge and the Complaint

On May 20, 1954, the union filed a charge against Respondent. (R. 19-22.) The union stated therein that the basis of the charge, insofar as this matter is concerned, was that on or about November 20, 1953, Respondent refused to bargain collectively with the union. (R. 20.) This is the only charge that was at anytime filed against Respondent.

On July 13, 1954, the Regional Director advised the parties that he was refusing to issue a complaint based upon the charge. (R. 25.) On July 31, 1954, the union made a request, allegedly pursuant to Section 102.19 of the *Board's Rules and Regulations*, for review of the Regional Director's decision. This request for review was not made within ten days from the time of the decision of the Regional Director pursuant to Section 102.19 of the Board's Rules and Regulations (supra). No action was taken by General Counsel upon the request for review. Nevertheless, on January 24, 1955, more than six months after such request was made, the Regional Director advised the parties by letter that he was withdrawing his refusal to issue a complaint with respect to the allegation of refusal to bargain contained in the charge and would proceed further with investigation. (R. 80-81.) During this period of time the office of General Counsel was vacant, it having been vacant from December 20, 1954 to March 29, 1955. (R. 132.) It was not until immediately before the issuance of the complaint, on August 12, 1955, that General Counsel was heard from wherein he advised the parties that further inquiries with respect to the alleged 8 (a) (5) allegation should be addressed to the Regional Director and that the ruling of the Regional Director on the 8 (a) (1) and (3) allegations was sustained. (R. 82-83.) Almost immediately, on August 17, 1955, a complaint was issued by the Regional Director alleging violation of Sections 8 (a) (1) and (5) of the Act. (R. 84-89.) Finally, a hearing was conducted and the Board issued its order now sought to be enforced.

C.

The Order of the Board

The Board issued an order on April 19, 1957, joined in by three members of the Board with one member dissenting, wherein it finds that Respondent violated the Act by refusing to bargain. In its decision, the Board states that the issue is whether or not Respondent was justified in its refusal to bargain with the union subsequent to November, 1954. (R. 118.) The Board bases its decision that Respondent has refused to bargain in violation of the Act upon an alleged and found to be unilateral general wage increase put into effect by Respondent on October 7, 1954. (R. 124.) The Board also further states in this connection that it finds that the October 1954 unilateral increase provides "the final insight into Respondent's conduct of negotiations with the union." (R. 126.) The dissenting member of the Board agreed with Respondent that Respondent had been prejudiced in the issuance of the complaint by the irregular procedural methods used by its agencies in the issuance of the complaint and that the Board did not have jurisdiction of the complaint because its *Rules and Regulations* and the *Administrative Procedure Act* had not been complied with. The dissenting member of the Board was further of the opinion that inasmuch as it was the October 1954 wage increase which constituted the basis for the order, that such was in contravention of Section 10 (b) of the Act and an order based upon such occurrence, it having occurred five and one-half months after the charge was filed and almost ten months before the complaint was issued, could not stand. (R. 129-135.)

D.

The Decision of the Court Below

Upon the Board seeking enforcement of its order, the Fifth Circuit Court of Appeals refused enforcement of the Board's order on the grounds that the Board had looked to and was relying upon the October 1954 wage increase as constituting an unfair labor practice, which it seeks to restrain, and the Court held that the charge in this case grew out of seven bargaining sessions held by union and Respondent between November 21, 1953 and May 20, 1954 and that the Board had not found and there was no evidence to reflect any lack of good faith practiced by Respondent during that period. The Court further held that no charge having been filed, to include such, the Board was precluded from finding that Respondent had violated the Act basing the finding upon an event occurring more than four months after the filing of the charge; that to hold that the Board could adjudicate the rights of parties upon events occurring subsequent to the filing of the charge which did not grow out of or relate to pre-existing unfair labor practices would be contrary to the statutory scheme. (R. 538-548.) It is from this holding that Petitioner applied for and was granted Writ of Certiorari to this Court.

VI.

Summary of Argument

Congress has provided in Section 10 (b) of the National Labor Relations Act that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge. It is accepted in our jurisprudence that a charge must be filed before the National Labor Relations Board has authority or jurisdiction to issue a complaint. The Board relies upon this Court's decision in the case of *National Licorice Company v. N. L. R. B.*, *309 U. S. 350, 367-369* as authority for it taking cognizance of actions occurring long subsequent to the filing of the charge herein and finding that those actions constitute a violation of the Act. The *National Licorice* case is not authority for the position of the Board. In the *National Licorice* case, the company there involved, was engaged in violation of the National Labor Relations Act at the time of the filing of the charge. The Board merely held therein and this Court sustained its holding, that the Board could deal with unfair labor practices growing out of those alleged in the charge while the proceeding is pending before the Board. There is a manifest difference in that situation where violations of the Act have occurred prior to the filing of the charge out of which the subsequent events grow and one where, as here, the rights are adjudicated upon the subsequent events, the period prior to the filing of the charge serving only as background. (R. 544.) In the case here before the Court, there was no proof, and no one prior to now, before this Honorable Supreme Court of the United States, has attempted to contend that at the time the charge herein was filed, there is any proof that Respondent had violated the Act. (R. 547-548.) Rather, in this case, the Board finds that subsequent to the filing of the charge, Respondent violated the National Labor Relations Act and then by some process of reasoning, not understandable to Respondent, finds that it follows that Respondent, though there was no evidence of it, was likewise violating the Act at the time the charge was filed. The Board fails to distinguish in this case between those situations in which violations of the Act are committed prior to the time of the filing of the charge, and subsequently other violations of the Act occur, which grow out of or are related to the violations which had occurred at the time of the filing of the charge, and those situations wherein no violation of the Act has occurred at the time of the filing of the charge. There is a difference in the two situations. There is authority for the Board asserting jurisdiction in the former situation. There is no authority for the Board asserting jurisdiction in the latter situation, wherein no amended charge is filed, and wherein the events in question occur more than six months prior to the issuance of the complaint. To permit the Board to assert jurisdiction in the latter situation is in direct contravention of Section 10 (b) of the Act, and permits it "carte blanche to expand the charge as it might please, or to ignore it altogether." (R. 544.)

Further, in this case, the Board has violated several provisions of its published *Rules and Regulations and Statements of Procedure*, contrary to the *Administrative Procedure Act.* The Regional Director of the National Labor Relations Board first refused to issue a complaint upon the charge filed. The charging union, eighteen days later made a request for review of the Regional Director's action. The

Regional Director's action occurred on July 13, 1954. The union's request for review was made on July 31, 1954. Section 102.19 of the *Board's Rules and Regulations* provides that a party must make request for review within ten days after the Regional Director's action. This was not here done. Section 101.6 of the *Board's Statements of Procedure* provides that upon request for review being made, the entire file is sent to Washington, D. C. where the case is reviewed by General Counsel and General Counsel may sustain the Regional Director's dismissal or may direct the Regional Director to take further action. While the matter was pending in the General Counsel's office, and while the office of General Counsel was vacant, the Regional Director on January 24, 1955, notified the parties that he was withdrawing his refusal to issue the complaint with respect to the alleged violations of Section 8 (a) (5) of the Act. At this time, the Regional Director had no jurisdiction over the charge, it then having been dismissed or before General Counsel upon an untimely request for review. On August 12, 1955, General Counsel wrote the parties a letter advising them that he was affirming the Regional Director's refusal to issue a complaint on the alleged violation of Section 8 (a) (1) and (3) of the Act, and that the Regional Director had previously withdrawn his dismissal of the allegations of Section 8 (a) (5) of the Act. Notwithstanding, the Regional Director forthwith issued a complaint alleging that Respondent had violated Section 8 (a) (1) as well as 8 (a) (5) of the Act.

The *Administrative Procedure Act, 5 U. S. C. A. 1001,* et seq., requires that an administrative agency, such as the National Labor Relations Board, publish its Rules and Regulations in the Federal Register and that no person shall in any manner be required to resort to organization or procedure not so published. The aforementioned Rules and Regulations and Statement of Procedure of the Board were published in the Federal Register. The Board did not comply therewith in this instance and Respondent is being required to resort to organization and procedure not so published, directly contrary to *The Administrative Procedure Act.*

It has not heretofore been contended by any party that there was any evidence, much less substantial evidence, upon which to base the Board's finding of Respondent's refusal to bargain prior to the October wage increase. The Court below specifically and properly refused to pass on this question because it was not necessary to its decision. (R. 539-540.) However, Petitioner here seeks to have this court pass for the first time upon this question, now contending that there is sufficient evidence upon which to support the Board's finding of refusal to bargain, based only upon events and conduct occurring prior to the filing of the charge. Respondent respectfully submits that such matter is not properly before this Court. If such was to be the position of Petitioner, it should have so stated and asserted before the Court below. Such a matter is first and primarily for the decision of the Court of Appeals, and in any event should not be passed upon by this court until the Court of Appeals acted thereon and then only if the Court of Appeals arrived at a decision which fair minded Judges could not make. As has been heretofore pointed out, Respondent met and bargained upon all subjects of bargaining up until November 1954. As stated by the Court below, neither the Trial Examiner nor the Board found, and the evidence does not reflect, that any lack of good faith existed prior to the filing of the charge. During that period of time, the parties discussed at length the various items of the contract, each making counter offers and suggestions, and on most items tentative agreements were reached. (R. 546.) Also, there is not substantial evidence to support a finding that the complained of October wage increase and the November withdrawal of recognition of the union were violations of the Act. However, neither is this question of substantiality before the Court. The sole and only question before the Court in connection with the October and November events is whether or not the Board may make an order based upon such events, they having occurred long subsequent to the filing of the charge and more than six months prior to the issuance of the complaint. It is the plain dictate of the Act that it may not. Further, the Board has in effect so provided by Section 102.12 of its *Rules and Regulations* and Section 101.2 of its *Statements of Procedure.*

VII.

ARGUMENT

A.

First Question

Whether or not the National Labor Relations Board can rely upon transactions occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, which are neither related to nor grow out of violations of the Act existing at the time the charge is filed, as constituting a violation of the Act and the basis of an order.

1. The Charge Does Not Include Events Subsequent to May 20, 1954

Congress has seen fit to place within the National Labor Relations Act a provision requiring anyone who wishes to allege a violation thereof to file a charge with the Board, setting forth, among other things, a clear and concise statement of the fact constituting the alleged unfair labor practices. *National Labor Relations Act*, Section 10(b). Sec. 101.2 *N. L. R. B. Statements of Procedure*, Sec. 102.12 *N. L. R. B. Rules and Regulations.* There are numerous decisions, and it is accepted by everyone that until the charge is filed the National Labor Relations Board has no jurisdiction whatsoever. The Act also provides that after the charge is filed the Board may issue a complaint "stating the charges in that respect." Congress saw fit to further provide that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. As stated by the Court below, the authority of the Board is derived solely from the statute. In this case, a charge was filed on May 20, 1954, and was at no time amended. The Regional Director investigated the charge, found insufficient evidence that Respondent had violated the Act and on July 13, 1954 refused to issue a complaint. On July 31, 1954, a request for review of this decision was made, though not timely, as hereinafter pointed out. For some reason this request for review was never acted upon by General Counsel. However, more than one year subsequent to the request for review being made, the Regional Director issued the complaint here in question upon which the hearing was held and the Board's order based. The gravamen of the complaint is that Respondent on or about October 6, 1954, put into effect a general wage increase which violated the Act. This places in the complaint a matter that was not in the charge and a matter that is not related to and does not grow out of any violation of the Act complained of or set forth in the charge. In fact, it is self evident, and the Board has conceded up until this proceeding, that but for the October 7, 1954 wage increase, there would be no violation of the Act by Respondent. The Board now argues before this Court, for the first time, that Respondent was guilty of refusal to bargain prior to May 20, 1954, the date of the filing of the charge. However, even before this Court, the Board continues to concede that but for the October 7, 1954 wage increase by Respondent and subsequent withdrawal of recognition of the union by Respondent, there would not be sufficient evidence to support a finding of a refusal to bargain by Respondent. In fact, the Board stated in its order that the granting of the wage increase gave it a "final insight" into Respondent's conduct of negotiations with the union. (R. 13.)

Petitioner cannot now argue in good faith that the October 7 wage increase relates back to the April 19 wage increase. The Circuit Court expressly found that its April 19 increase "was the result of the discussions between the parties and was initiated by the union." (R. 546.) The Union approved the April 19 wage increase and did not specify it in its charge filed some four weeks later. The silence of the charge on this point means much since it was signed by Cox, one of those whom the Circuit Court found to be "experts who made the negotiation of contracts their life's work." (R. 539 n. 4) Additionally, the Board itself has seen fit to provide by its Statements of Procedure and Rules and Regulations that the charge shall set forth the facts constituting the alleged violation of the Act. *N. L. R. B. Rules and Regulations, Section 102.12; N. L. R. B. Statements of Procedure, Section 101.2* By no stretch of the imagination, can it be reasoned that the charging party in this case contemplated the April 19 wage increase as constituting a violation of the Act. Nor by any stretch of the imagination can it be reasoned that the charging party in this case set forth any allegations or facts in its charge out of which the subsequent events, the October wage increase and November withdrawal of recognition upon which Petitioner relies, grew or are related.

2. The National Licorice Case Is Not Apposite

The Board relies upon the case of *National Licorice Company v. N. L. R. B., 309 U. S. 350* as authority for its position. That case is not authority for the position taken by the Board. The *National Licorice Company Case* was decided by this Court prior to the 1947 amendment placing the six month statute of limitation in the Act. Respondent submits that this in itself places a limitation upon the meaning and import of this Honorable Court's decision in the *National Licorice Company Case*. However, notwithstanding such amendment, this court held only in that case that the National Labor Relations Act does not preclude the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. In that case it was determined to the satisfaction of this court that the employer therein was guilty of certain unfair labor practices at the time of the filing of the charge, as alleged in the charge, and that the subsequent violations of the Act were related to and grew out of, and under the facts were an actual continuation of, the identical unfair labor practices which the employer therein had committed prior to the filing of the charge. Such is not here the case. The Board in this case wishes to look to subsequent acts as constituting a violation of the Act, without which it concedes there would be no violation, then relate that finding back to a date preceding the filing of the charge, and infer therefrom that Respondent was violating the Act at the time the charge was filed. In this connection it is now called to the attention of the court that General Counsel announced during the hearing that the Board had no act constituting a violation of Section 8(a)(5) of the Act until an act relied upon which occurred at the end of negotiations. (R. 479-480.)

There is a material difference between the holding in the *Licorice* case and the position of the Board in this case. On the one hand, this Court and other courts have permitted the Board to look forward from the time of the violation of the Act occurring prior to the filing of the charge and take jurisdiction of *related* acts growing out of and constituting a continuation or prolongation of that violation. On the other hand no court has held, and Respondent respectfully submits that it is directly contrary to the Act, that the Board may look to an act occurring subsequent to the filing of the charge in the first instance as constituting a violation of the Act. To so hold will render Section 10 (b) of the Act meaningless. Particularly would such a holding render meaningless the six month limitation provision therein contained where the acts relied upon occurred not only subsequent to the filing of the charge but more than six months prior to the issuance of the complaint.

The purpose of the National Labor Relations Act is to promote industrial peace and harmony. The policy here sought to be enforced by the Board would lead to the inescapable result of having a party to negotiations, at the very beginning, filing a general charge with the Board, in some manner keep it from being acted upon, possibly as here by an untimely request for review of the Regional Director's dismissal of the charge, never acted on by the General Counsel, and hope to maneuver the adversary into a position where it could be contended that some particular act on his part at a subsequent date would constitute a refusal to bargain. This is and could amount to nothing more than a "fishing expedition" of the broadest type, and is tantamount to a general injunction. Courts have long guarded against both evils. This is not answered by the statement that one would not be able to keep the charge alive and keep it from being acted upon, for as is seen here, the charge was filed on May 20, 1954, and lay dormant until August 17, 1955, fifteen months later. Such a policy could not lend itself to constructive bargaining negotiations. If Section 10 (b) of the Act has any meaning at all, it precludes the Board from taking such action.

The Board argues before this Court that the decision of the Court below would restrict its authority and hamper its enforcement of the Act because it restricts the Board to the precise violation particularized in the charge. This is false argument by the Petitioner. The decision of the Court below does not so curtail the Board. Further, the decision of the Court below is in keeping with the various decisions that the Board may enlarge upon the charge as to violations of the Act related to and growing out of violations of the Act occurring before the filing of the charge. The only restriction placed upon the Board by the decision below is that the Board cannot look to events occurring subsequent to the filing of the charge as the basis of a complaint or order, particularly when the subsequent event looked to occurs more than six months before issuance of the complaint. Such is the plain dictate of Congress under Section 10 (b) of the Act.

The alleged unfair labor practice here involved, did not grow out of an unfair labor practice alleged in the charge as in the *National Licorice Company* case. In this case there was no unfair labor practice at the time of the filing of the charge. In the *National Licorice Company* case, a charge was filed on August 2, 1937, alleging that the employer had coerced and attempted to coerce its employees into signing individual contracts and that the company had called meetings of its employees and compelled them to attend meetings and attempted to compel the employees to form committees not of their own choosing to bargain collectively with the company. By the time the complaint was issued, only two months later, on October 2, 1937, the employer therein had initiated a labor organization of its employees which it dominated and this was set out in the complaint. The Court of Appeals therein held and this court affirmed that all of the Acts there involved constituted only one transaction and that the Board was within its powers in treating the whole sequence as one. *(309 U. S. 369.)*

An entirely different situation here exists. The charge in this case alleges only that Respondent on or about November 20, 1953, refused to bargain with the Union (R. 20.) Attention is directed to the fact that the charge does not allege that Respondent refused to bargain on any date other than November 20, 1953, or that the refusal to bargain was of a continuing nature. A mere charge of refusal to bargain on a date certain, without alleging "at all times since" is not a charge of a continuing offense. *American Federation of Grain Millers v. N.L.R.B. 197 F. 2d 454.* Further, the Board itself concedes that the earliest date that any refusal to bargain could be found is November 21, 1953, thus, the charge alleging a refusal to bargain as having occurred more than six months prior to the filing thereof, was void from its inception and any complaint issued thereon is likewise void. Further, subsequent to the *National Licorice Case*, Congress added the six month limitation provision to Section 10 (b) of the Act, and the events here relied upon were found to have occurred more than six months before the issuance of the complaint.

3. The Filing of a Charge Does Not Toll the Six Months Limitation Provision of the Act as to Subsequent Events

The Board argues before this Court, that one of the purposes of the amendment of Section 10 (b) of the Act is to prevent the resurrection of stale charges long after their commission in order that relevant evidence and records might be available to the wrong doer. Admittedly, this is one of the purposes of the amendment of Section 10 (b) of the Act but no means the sole purpose thereof. The Board argues that once the charge is filed, the whole purpose of the amendment is accomplished because the alleged wrong doer is then put on notice that all of his subsequent actions are under surveillance by the Board. This reasoning is not tenable, particularly as to events not alleged in the charge, and not growing out of any alleged actions committed before the charge is filed. Certainly, the same basic reason against the resurrection of stale charges exists for not resurrecting events more than six months prior to the issuance of a complaint as a charge. There might be some merit to this argument of the Board from the standpoint of stale charges if the alleged violation in question occurred within six months of the filing of the complaint. However, there is no merit to the argument wherein the alleged violation occurs not only subsequent to the filing of the charge but almost a year prior to the issuance of the complaint, as here.

The Court below does not hold, as argued by Petitioner, that the complaint must be confined to the exact limits of the claimed violation set forth in the charge. The Court below holds that the complaint must confine itself to matters related to or growing out of unfair labor practices alleged and found to have been committed prior to the filing of the charge. As stated by the Court below, if the charging party wished to put the October wage increase in issue, it was incumbent upon it to file a new charge or an amended charge. In the language of the court below:

> "Assuming that another charge could have been filed embracing the happenings of October and November, 1954, or the original charge amended to include them, it was not proper for the Board to proceed on the basis of the charge of May 10, 1954 and enter the order here before us bottomed upon actions taken more than four months later. That this is what it did is exemplified by what the Board said was the issue it was trying: 'The issue before us is whether the Respondent, in this long course of dealing with the Union, fulfilled its duty to negotiate in good faith so as to justify its refusal in November 1954 to prolong the discussion of collective bargaining issues, or whether on the other hand it evaded its legal duty and was thus without warrant in November 1954 and thereafter for refusing to meet with the Union.' Substantially eight of the eleven pages constituting the decision are devoted to a discussion of what transpired in September, October and November. If the Board could thus adjudicate the rights of the parties on such subsequent ac-

> tions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent carte blanche to expand the charge as they might please, or to ignore it altogether." (R. 543-544.)

In fact, the failure of the Union to file a charge incorporating the October wage increase and the November withdrawal of recognition is tantamount to an admission that it did not consider either of these events as violations of the Act. This reasoning by the union may have been prompted by the fact that it knew that it was advised of the October wage increase prior to its institution and that it knew at the time of the November withdrawal of recognition that it did not represent a majority of Respondents' employees. However, the reason is unimportant, the fact remains that the union remained silent and did not act when it had the duty to act if it desired to complain or invoke the jurisdiction of the Board as to the events in question.

Not only does the decision in the *National Licorice Company* case by this court fail to support the position of the Board here, but likewise the Court of Appeals cases cited by the Board as authority for its position, *National Labor Relations Board v. Kohler Company, 220 F. 2d 3* and *National Labor Relations Board v. Epstein, 203 F. 2d 483* are distinguishable from the facts of the present case. While in the *Kohler* case the Seventh Circuit made the general statement that the sixth month limitation refers only to acts that occur before the charge and does not prohibit the inclusion of similar or related acts happening after the charge, the Board fails to take cognizance of the fact that here no acts occurred before the filing of the charge. It follows there could be no similar or related acts growing out of any acts which did not exist. As pointed out by the Court below, the acts mentioned in the *Kohler* case consisted of mere repetitions of applications by former employees named in the charges which had been made within the two six month periods covered by the charges. Also, the Seventh Circuit particularly pointed out in the *Kohler* case that there must be some relation between the charge and the complaint and if the Board gets so completely outside the situation which gave rise to the charge it may be said to be initiating the proceeding on its own motion, then the complaint should fall as not supported by the charge. *220 F. 2d 7.* This is exactly what the Board has here done. The Board has gotten completely away from the situation which gave rise to the filing of the charge and has in effect initiated a complaint upon its own accord in direct contravention of Section 10 (b) of the Act and of the decision in *National Labor Relations Board v. Hopwood Retinning Co., 98 F. 2d 97* and many other decisions.

In the *Epstein* case supra the Third Circuit stated by way of dictum that it thought that the complaint could have properly included matters occurring subsequent to the filing of the charge without the amended charge. It did so because the original charge alleged a continuing violation and the subsequent acts were of the same class and were continuations of the act charged in pursuance of the same objects. *(203 F. 2d 485.)* That is not the situation in this case. There is no charge of a continuing violation and the act here relied on by the Board as constituting a violation of the Act is not and could not be a continuation of an earlier violation of the Act, particularly an act which did not exist. Also, in the *Epstein* case an amended charge was filed. That was not done in the instant case.

There are three well reasoned Circuit Court decisions holding that Section 10 (b) of the Act precludes the Board's issuance of a complaint and finding an unfair labor practice based upon events occurring subsequent to the filing of the charge. *N. L. R. B. v. Newton, 214 F. 471; Indiana Metal Products Corporation v. N. L. R. B., 202 F. 2d 613* and *N. L. R. B. v. I. B. S. Mfg. Co., 210 F. 2d 634*. In those cases, the respective courts held that the Board could not base an unfair labor practice finding upon a matter occurring subsequent to the filing of the charge and more than six months prior to the filing of either a complaint or an amended charge. As stated by the Fifth Circuit Court in the *Newton* case, without such limitation, the provisions of Section 10 (b) of the Act would be rendered meaningless to a great extent. The Ninth Circuit in the case of *N.L.R.B. v. Globe Wireless, 193 F. 2d 748, 752,* holds in effect that the Board is not debarred by the Amended Act from enlarging upon a charge unless the additional unfair labor practices alleged are committed more than six months prior to the enlargement. There is no question but that the enlargement here in question relates to acts occurring more than six months prior to the enlargement. The Fourth Circuit has held likewise. *Joanna Cotton Mills v. N.L.R.B.*, *176 F. 2d 749.*

Respondent respectfully submits that not only Section 10 (b) of the 1947 Amendment precludes the Board issuing a complaint based upon any alleged unfair labor practices occurring more than six months prior to the filing of a charge or an amended charge but that even under the original Act, before amendment, the complaint in this case is fatally defective. In this case the events in question occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint could not grow out of or be related to any event occurring prior to the filing of the charge because none existed. Thus, even the *National Licorice Company Case* relied upon almost exclusively by petitioner, does not support the Board's position. However, if it did support the Board's position, Respondent submits that the 1947 amendment to Section 10 (b) of the Act stating in no uncertain terms the six month limitation period, precludes the Board from enlarging a complaint so as to include matters not included in the charge and occurring more than six months prior to the issuance of the complaint.

4. Insufficiency of the Evidence

While it is considered by Respondent that the questions heretofore discussed dispose of this case, and that the question of whether or not there is substantial evidence to support the Board's findings is not properly before this Honorable Court, inasmuch as the Board specifically urges it to the Court, Respondent feels that it should discuss this question.

It is well accepted by this Court that the primary duty of reviewing the actions of the National Labor Relations Board and ascertaining whether it complies with the substantial evidence rule lies with the various Circuit Court of Appeals. In the language of this Court in the case of *N. L. R. B. v. Pittsburg S. S. Company, 340 U. S. 498, 503; 71 S. Ct. 453, 456*, opinion by Mr. Justice Frankfurter, it is stated:

> "But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. * * * The same consideration that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues. This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded Judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situation we should adhere to the usual rule of non-interference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit of different interpretations."

This Court reaffirmed this language in an opinion by Chief Justice Vinson in the case of *N. L. R. B. v. American National Insurance Company, 343 U. S. 395, 410; 72 S. Ct. 824, 832.* As stated by the Court below, neither the Trial Examiner nor the Board found, and the evidence does not reflect that any lack of good faith was practiced during the period of November 21, 1953 to May 20, 1954. (R. 546.) In the concurring opinion by Chief Justice Hutcheson it is stated that were the only question in the case whether the record as a whole supports the Board's finding that, as charged by the union, and alleged in Paragraph 8 of the Complaint, Respondent refused to bargain in good faith in violation of Section 8 (a) (1) of the Act, I would content myself with concurring in the view of the majority that it does not. (R. 548.) The Court below further states that but for the allegations with regard to the October 7, 1954 wage increase, unsupported by any charge and for the proof that came in under it, there was there could be, no reasonable basis for the finding of the Board. Without aid from this source, in short, the Board's finding that Respondent did not bargain in good faith, runs directly contrary to the teaching of the statutes. (R. 549.)

The Court below has indicated that the evidence does not support a finding of a refusal to bargain against this Respondent. This Court has repeatedly held that such finding was not to be reviewed nor disturbed by this Court except in the most unusual situations. Notwithstanding, the Petitioner seeks to have this Court review its allegations that Respondent prior to May 20, 1954, refused to bargain.

(Board's Brief 23-25.) Many of the various items petitioner sets out therein as constituting refusal to bargain were discussed by the Court below. (R. 546.) The Court below held that the evidence on these matters argued by Petitioner did not support a finding of refusal to bargain.

If this Honorable Court should for any reason, deviate from its previously announced procedure, and decide to consider the substantiality of the evidence in this case, particular attention is called to the fact that the official record is far from complete. During the hearing before the Board, complete transcripts of each bargaining session were introduced into evidence. This consisted of 19 exhibits of an average length of about 125 pages each. The brief extracts from these transcripts in the record do not give a complete picture of the negotiations between Respondent and the union. While the Court below specifically did not pass on the substantiality of the evidence, it did read the entire record, not just the appendices. (R. 539.) It is on this background that the Court below makes some statements by way of dictum indicating that it did not feel there was substantial evidence to support a refusal to bargain charge, of which Petitioner so vigorously complains. While this is one of the very reasons this Court should not disturb substantiality of evidence decisions by Courts of Appeals, if this Court now decides to pass on this question, it is believed that it too will carefully consider the entire record, not just the appendices, in order that it too may have the complete picture of negotiations.

As heretofore pointed out, Counsel for Petitioner announced during the hearing that it had no act that constituted a refusal to bargain prior to the end of negotiations. (R. 479-480.) Now for the first time, Petitioner changes its position and argues that certain alleged instances do constitute a refusal to bargain. For instance, Petitioner contends that Respondent's negotiators were curtailed in their authority to bargain over bargainable matter. The evidence relied upon by Petitioner, in this connection, was interpreted by the Trial Examiner during the course of the hearing to mean that there were items which Respondent's President did not wish to be in the contract. (R. 491.) In this connection, the Trial Examiner stated:

> "As I understand the testimony, the import of the testimony up to date, it is that Mr. Fant did issue instruction or at least instructed his committee, so to speak, of his desire as to what he wanted or did not want in the contract." (R. 491.)

Further, the record is abundant with evidence that on the very matters which Petitioner contends Respondent's negotiators had been restricted in their bargaining, Respondent did meet and bargain and discuss with the union negotiators. For instance, the Court below states that the question of arbitration was discussed at three meetings and the question of wages at five meetings prior to May 20, 1954. (R. 546.) Respondent did insist on a non-strike clause but as to the arbitration clause, Respondent indicated its willingness to have a limited form of arbitration or an arbitration clause placing a limit on the number of times it could be used. (R. 501-503.) Also, Respondent attempted to bargain and made concessions as to its desired no-strike clause. (R. 469.) Respondent knows of no authority holding that bargaining for a non-strike clause and the omission of an arbitration clause is per se refusal to bargain in violation of the Act. Respondent does not believe that such will be the holding of this Court. Likewise, Respondent's desire not to bind itself by contract to enter into an agreement whereby it contracted to pay vacations, even though it had had a week's vacation for a period of time prior thereto, does not constitute a violation of the Act. Rather, a part of the risk incurred by employees when their bargaining agent negotiates a contract, is that he will barter off some of the privileges and benefits previously enjoyed by them.

With regard to the desire of Respondent to have the right to raise wages, Respondent attempted to negotiate on this subject. Even though a steadfast demand for such right would not constitute a refusal to bargain, Respondent agreed to contract to pay the current wages for the period of the contract. (R. 95.) The union initially agreed to such but later changed its position. Respondent did ask for a right to raise and lower wages, to which the union objected. Respondent then suggested that certain minimums and maximums be inserted within which range Respondent would be bound, to which the union refused to agree. (R. 508-509.) Respondent did not make counter proposals more stringent than those it had hitherto urged, as argued by the

Board. Certainly there were different ideas proposed by Respondent in an effort to find some area of agreement. It was understood and agreed between the parties that no agreement on any specific issue would be binding until an agreement upon the entire contract had been reached. (R. 490.) This is necessary because any contract must be a give and take proposition and though a single subject may be agreed upon, when one yields somewhere else, it may necessitate a reopening of a matter earlier agreed upon. Respondent did not refuse to agree to the proposal for selecting a neutral arbitrator but rather stated, as heretofore shown, that it would agree upon some limited form of arbitration. Also, Respondent did not refuse to furnish information relative to classifications and wage rates at its plant, notwithstanding the Board's argument to the contrary. (R. 210-211; 517-518.) The various cases cited by Petitioner in support of its broad propositions of law have to do with entirely different fact situations than those which here exist. Respondent made numerous concessions during the negotiations. Among those concessions were an agreement to an increased shift differential in accordance with a request by the union; (R. 25) an agreement to make certain wage adjustments in its feed mill at the request of the Union; (R. 393-394; 498-499; 286-288; 517-518) an agreement to contract as to wage rates to classifications among its employees, or in the alternative, to establish minimum and maximum rates for each classification at the union's demand; (R. 507-509; 281) a concession to Union demands for a seniority clause with the exception that Respondent wanted to allow for a man's ability to work to have some part in determining promotions, demotions, layoffs and recalls, etc.; (R. 519-521) an agreement on paid holidays as requested by the union; (R. 500, 522) an agreement on reporting pay and call-in time demanded by the union. (R. 522-523.) There were various other concessions which one could go on at length to mention that Respondent made and yielded its position in an effort to arrive at a workable contract with the union. Petitioner seemingly would find Respondent guilty of a refusal to bargain by the mere fact that it did not agree to certain things that Petitioner thinks it should have agreed to. Petitioner loses sight of the fact that the Act itself only requires one to make a bona fide effort to reach an agreement and expressly provides that the obligation to bargain and enter into a contract in writing does not compel either party to agree to a proposal or require the making of a concession. *National Labor Relations Act*, Sec. 8 (d). Respondent bargained in good faith, wanted an agreement in writing but could not obtain a contract that it was willing to accept. The Act does not require capitulation. This has been held many times by our Courts. *Texas Foundaries, Inc. v. N. L. R. B., 211 F. 2d 791; N. L. R. B. v. United Clay Mines, Corp., 219 F. 2d 120; N. L. R. B. v. I. B. S. Manufacturing Company, 210 F. 2d 634; N. L. R. B. v. American National Insurance Company, 343 U. S. 395* and many other cases.

The record is replete with evidenc. .hat Respondent did bargain in good faith and evidence to the contrary is totally lacking. In fact, Counsel for Petitioner in the hearing, and

Petitioner in its order and before the Court below, conceded that but for the October 7, 1954 wage increase and subsequent withdrawal of recognition, there was not evidence of a refusal to bargain. Thus, it follows that the decision of the Court below that there is not sufficient evidence to support the Board's order finding that Respondent did not bargain in good faith should not be disturbed by this Court. *N. L. R. B. v. American National Insurance Company*, supra.

The real reason that no contract was reached during negotiations was because of the adamancy of the union. As heretofore pointed out, there were only two matters of major importance according to the union negotiators that stood between them. These two matters were those of arbitration and seniority. As heretofore abundantly pointed out to the Court, the Union, throughout negotiations, insisted that it was going to have an unlimited arbitration clause in the contract and that length of service alone was going to control promotion, demotions, layoffs, recalls etc. Respondent made various efforts of compromising the adamant position of the union in regard to these two matters all to no avail. It was at the negotiation conference of September 17, 1954 and the one immediately prior thereto that the union became very adamant in its position about an unlimited arbitration clause. At those meetings the union stated that it was going to have such a clause even if it meant spending six months and then six months again negotiating therefor. (R. 433, 514-516.) Thus, it was the union's refusal to bargain and the impasse created by this adamant stand that actually resulted in the failure of a contract being reached. In such a situation, there can be no refusal to bargain by Respondent. *N.L.R.B. v. Algoma Plywood and Veneer Company, 121 F. 2d 602; Superior Engraving Company v. N.L.R.B., 183 F. 2d 783.* Thus, it is quite evident that at least by September 17, 1954 an impasse had been reached and the subsequent wage increase by Respondent would not under any circumstance, until the impasse was broken, constitute a refusal to bargain. This impasse was never broken.

B.

Second Question

Whether or not the National Labor Relations Board has jurisdiction of a matter wherein the complaint is issued contrary to its published Rules and Regulations and the Administration Procedure Act.

1. The Charge Is Void

Respondent submits that under the fact situations of this case, jurisdiction was never vested in the National Labor Relations Board.

As heretofore pointed out, the charge, upon which the complaint issued, charged Respondent with refusing to bargain on or about November 20, 1953, and was filed on May 20, 1954. It is conceded by Petitioner that the six month statute of limitation placed in the Act ran as of November 21, 1953. Thus, this allegation of the charge was and is void and would not support a complaint. The charge being void, the necessary prerequisite for the Board to exercise jurisdiction is lacking. *National Labor Relations Board v. Vare, 206 F. 2d 543.* Petitioner, by implication, seeks to save the charge by arguing that it is a charge of a continuing nature inasmuch as the Board's form has in it the printed language that the employer has engaged in and is engaging in unfair labor practices within the meaning of the Act. However, this does not save the charge as in that part of the form wherein the basis of the charge must be set out, it is alleged by the charging union that on or about November 20, 1953 Respondent refused to bargain. There is nothing whatever said about Respondent refusing to bargain on any other date or at anytime since November 20, 1953. The mere fact that it is a charge of a refusal to bargain does not make it continuing in nature. *American Federation of Grain Millers v. N.L.R.B., 197 F. 2d 451.* Further, this printed part of the charge at the most could mean nothing more than that it is contended that the one complained against is engaging in the act complained of as of the date the charge is signed. In this case, May 20, 1954.

2. Regional Directors Dismissal of Charge Became Final

Secondly, the charge filed by the Union was dismissed by the Regional Director from which there was no timely appeal. As heretofore pointed out, *Section 102.19 of the Board's Rules and Regulations* provides that a copy of a request for review of the Regional Director's action must be made within 10 days by any party wishing a review thereof. In this case, the Regional Director refused to issue a complaint and gave written notice thereof to the parties on July 13, 1954. (R. 24-28.) No extension of time was made for making request for review so far as is known by Respondent and no granting of an extension of time appears in the record. On July 31, 1954, the union made a request for review, stating that it had been given an extension of time until August 2, 1954. However, there is nothing in the record to show that such an extension of time was given or asked for. A timely request not having been made for review, the decision of the Regional Director dismissing the charge became final and no charge was before the Board on August 17, 1955 on which it could base a complaint, and there was no authorized issuance thereof.

3. Regional Directors' Unauthorized Withdrawal of Dismissal

Thirdly, even if there had been a timely appeal of the Regional Director's refusal to issue a complaint, *Section 101.6 of the National Labor Relations Board's Statements of Procedure* provides that the entire file be sent to Washington D. C. and the General Counsel may sustain the Regional Director's dismissal or may direct the Regional Director to take further action. At no time did General Counsel direct the Regional Director to take further action. Rather, on January 24, 1955, the Regional Director, upon his own volition, advised the parties that he was withdrawing his refusal to issue the complaint with respect to the alleged 8 (a) (5) allegation of refusal to bargain. (R. 80.) This all occurred at a time when the office of

General Counsel was vacant. (R. 132.) The Regional Director was not authorized to act in this instance. A notice of withdrawal of refusal to issue complaint with respect to 8 (a) (5) allegation refers to additional evidence having been furnished the Regional Director and the Regional Director advised Respondent that such additional evidence was the wage increase of October 6, 1954. The Regional Director had no authority to consider such additional evidence in connection with a charge upon which he had already acted. If the union wished to place this matter in issue in the language of the court below, it could have and should have filed a new charge including such. (R. 547-548.) The union chose not to do this and the Board and its agencies are without power to do it for them or to consider it as having been done. Assuming the Regional Director correctly dismissed the charge initially, it follows that General Counsel would affirm such dismissal. The additional evidence referred to was not before General Counsel. The only conclusion that can be reached is that this unorthodox and unauthorized procedure, contrary to the *Administrative Procedure Act*, prejudiced respondent.

4. General Counsel Affirms Regional Directors' Dismissal

Fourth, General Counsel apparently attempted to rectify this irregular and unauthorized procedure and wrote the parties a letter on August 12, 1955, 8 months subsequent to the Regional Director's notification that he had withdrawn his refusal to issue a complaint, advising them of the Regional Director's actions of January 24, 1955 and sustaining the ruling of the Regional Director dismissing alleged violations of Sections 8 (a) (1) and (3) of the Act. Petitioner in fact argues that this letter rectifies all of the improper procedure engaged in by the Regional Director. The letter does not and could not do such. The letter in effect sustained the Regional Director's dismissal of the allegations in the charge pertaining to violations of Sections 8 (a) (1) and 8 (a) (3) of the Act, and thereby dismissed the charge in its entirety. No violation of Section 8 (a) (5) of the Act could exist without a violation of 8 (a) (1) of the Act. Notwithstanding, General Counsel having sustained the Regional Director's dismissal of Sections 8 (a) (1) and (3) allegations contained in the charge, only five days later, on August 17, 1955, the Regional Director issued a complaint wherein it is alleged that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) sub-section (1) of the Act. (R. 88-89.) This, the Regional Director had no authority to do.

In the complaint issued, the only event that is alleged with any particularity charging Respondent with violating the National Labor Relations Act is an allegation that Respondent on or about October 7, 1954, without notice to the union, put into effect a general wage increase to all employees in the unit described above. (R. 88.) It is self evident that this is the heart of the complaint and is the only basis upon which it was issued. This is directly contrary to Section 10 (b) of the Act as heretofore pointed out.

Thus, we see that the complaint in this case has been issued directly contrary to the *Board's Rules and Regula-*

tions and *Statements of Procedure*, the *Administrative Procedure Act* and *The National Labor Relations Act* itself. It cannot be argued by any party conscientiously that the *Board's Rules and Regulations* and *Statements of Procedure* have been followed. The Petitioner apparently wishes to ignore this unorthodox and unauthorized procedure. However, such *Statements of Procedure and Rules and Regulations* have been published in the *Federal Register* under the provisions of *The Administrative Procedure Act* and the Board is bound thereby and any procedure not in accordance therewith is invalid in its entirety. *Ohm v. Perkins, 79 F. 2d 533.* Nor, as the dissenting member of the Board points out, is it any answer to say that a departure from the Rules and Regulations is unimportant? *McKay v. Wahlenmaier, 226 F. 2d 35; Bridges v. Wixon, 326 U. S., 135; Accardu v. Shaunessy, 347 U. S. 260.* It is clear that a departure has been had from the published statements of procedure of the Board to the prejudice of the Respondent. *The Administrative Procedure Act* specifically provides that no person shall in any manner be required to resort to organization or procedure not so published.

VIII.

CONCLUSION

Thus, we find that not only does the Board seek enforcement of an order based upon a matter over which it does not have jurisdiction inasmuch as its rules and procedure were not complied with, but that it also seeks enforcement of an order based upon an event which occurred subsequent to the filing of any charge and more than six months prior to the issuance of a complaint over which its jurisdiction was never invoked within the meaning of the Act itself and which was barred by the six month limitation provision of the statute. Further, Petitioner tries to impose upon this Court the task of passing in the first instance upon the substantiality of the evidence, a matter that Congress did not intend for this Court to do and which this Court has steadfastly refused to do.

It follows that the judgment of the Court below denying enforcement of the Board's order should be in all things affirmed.

Respectfully submitted,

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March 18, 1959.

IX.

CERTIFICATE OF SERVICE

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in the United States Post Office with Air Mail postage prepaid to each Hon. J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C. and Jerome Fenton, General Counsel, National Labor Relations Board, Washington 25, D. C., this 18th day of March, 1959.

O. B. FISHER
Of Counsel for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 482

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
FANT MILLING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 538–552) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 117–129, 137–182) are reported at 117 N.L.R.B. 1277.

JURISDICTION

The court below entered its judgment on August 1, 1958 (R. 553). The petition for a writ of certiorari was granted on December 16, 1958 (R. 554). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

A union, certified by the Board, filed a charge alleging that the employer was not bargaining in good faith. The Board in due course conducted an investigation and issued a complaint alleging that the employer had violated its bargaining obligation. The question presented is whether the Board in formulating its complaint is circumscribed by a requirement that it confine itself to the specific facts recited in the charge, or whether it may place substantial reliance upon events occurring after the filing of the charge which were uncovered during the course of the investigation.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)[1] are as follows:

UNFAIR LABOR PRACTICES

> SEC. 8 (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) *For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder,*

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[1] The provisions printed in italics were added by the Taft-Hartley amendments of 1947; the remaining provisions were in the original Act, 49 Stat. 449.

*and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.*

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.* Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

STATEMENT

I. THE FINDINGS, CONCLUSIONS, AND ORDER OF THE BOARD

A. THE BARGAINING NEGOTIATIONS

The American Federation of Grain Millers, AFL–CIO, herein called the Union, won a Board-conducted election in June 1953, and became the certified bargaining representative of respondent's employees (R. 148, 190). Thereafter, representatives of the Union and of respondent met in a series of approximately twenty bargaining conferences between August 1953 and November 1954, but failed to reach agreement on a contract (R. 148–153, 227–229). Prior to the commencement of these negotiations and on a number of subsequent occasions, respondent's president instructed his negotiators to bear in mind that "he would not sign a contract" that contained an arbitration clause; that the contract must contain a no-strike clause with a monetary penalty for its breach; and that seniority was not to be the sole governing factor in promotions or layoffs (R. 164, 232–233, 259–260). On one occasion respondent told the Union that the monetary penalty would apply only to strikes authorized by the Union, but respondent later insisted that the penalty apply also to unauthorized strikes (R. 366–368, 374–377).

During the course of the negotiations, the Union made repeated unsuccessful requests for a list of employees in the unit, together with their classifications, wage rates, and dates of employment. These requests were made on August 13, November 12, 1953, and January 29, 1954, before the Union filed a charge with the Board, and on July 2 and October 15, 1954, after the filing of the charge (R. 148–149, 160, 162, 19, 196, 327–338, 377–380, 426–430, 458–460, 462–464).

In April 195~~3~~4, during the course of the negotiations, and about one month prior to the filing of the Union's charge, the Company put into effect certain wage adjustments for some of the employees without negotiating with the Union concerning the changes (R. 165, 176–177, 19, 201–203, 247–248). Again in October 1954, while negotiations were in progress but after the filing of the charge, the Company, without notice to or consultation with the Union, instituted a general across-the-board wage increase (R. 119–120, 165, 175, 19, 241–246, 249–254, 259, 478).[2] The Company's action in instituting these wage changes without prior negotiation with the Union on the subject was consistent with the Company's insistence throughout the bargaining sessions (both before and after the filing of the charge) that any contract it signed must provide for the Company's right to raise wages without any negotiation with the Union (R. 156–157, 159, 198–199, 203, 279, 281, 286, 289, 336–339, 397–399, 419–421). Respondent on one occasion disclaimed any desire for power to make wage reductions, but thereafter demanded that the contract authorize it not only to revise wages upward but also to lower them without bargaining with the Union (R. 334–335, 397–399).

During the course of the negotiations the Company repeatedly refused to incorporate certain practices of long-standing into a contract. Thus the Company admitted that for many years it had followed the practice of giving a paid vacation of one week to its employees each year, and of paying slightly higher wages to employees on later shifts, and that it expected to continue these practices, but it refused to contract to do so (R. 320–321, 359–362, 369–371). Similarly, although the Company stated that it had never sought, and did not intend in the future, to avoid payment of overtime by staggering the workweek (i.e., laying off employees during the week and recalling them on Saturday), it refused to incorporate a "no-stagger" clause into any contract (R. 302–303, 368–369, 372–374).

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[2] The details attending this action are accurately set forth with full record references in the dissenting opinion filed in the court below (R. 552, n. 1).

In the course of the bargaining negotiations respondent did make certain "concessions." Thus, respondent agreed to pay overtime for work in excess of 40 hours in any one week as required by law (R. 304–305, 307–308, 198–199, 281); it agreed to refrain from discrimination, restraint, and coercion against any employee because of membership or non-membership in the Union (R. 330–31); it agreed to state in the contract that "we will do our best" to continue giving employees a one week vacation with pay (R. 451); it agreed to give the Union space on the plant bulletin board (R. 346–347); it offered to agree to an arbitration clause providing it could be used only once a year (R. 414–417, 421–423, 432) or in the alternative a clause providing for arbitration where both parties agreed it was necessary (R. 432).[3]

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[3] These "concessions" should be compared with the Union's expressed readiness "to modify a great many" of its proposals (R. 526), as exemplified in its agreement to a monetary penalty for breach of a no-strike clause, its willingness to abandon its arbitration proposal, its acceptance of respondent's griev-

The last bargaining session was held on October 15, 1954 (R. 161–162, 455–470). At this meeting, the Union protested the Company's action in granting a wage increase without notice to or consultation with the Union (R. 120, 161, 460–462). Various other subjects were discussed, but by the end of the meeting the parties had still reached no agreement as to whether the contract should contain an arbitration provision, as to whether the contract should contain a no-strike clause, and as to the extent to which seniority should govern promotions and layoffs (R. 161–162, 455–470). In addition, no agreement had been reached as to whether the contract should include commitments by respondent to continue its existing practices with respect to paid vacations, shift differentials, and regularity of working hours (R. 302–303, 320, 368–374). Respondent had also failed to supply the data repeatedly requested by the Union (*supra,* p. 4).

When the parties met again on November 19, 1954, the Company announced that it would no longer recognize the Union as the employees' bargaining representative and that it would not bargain further (R. 121, 162, 206, 472, 475, 478). The Company alleged that it had received "word of mouth" information that the Union no longer represented a majority of the employees (R. 207–209, 294–295, 476).

B. PROCEEDINGS BEFORE THE BOARD

On May 20, 1954, after several months of fruitless bargaining conferences, but prior to the October wage

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ance proposal, and its offer to reduce its vacation request (R. 363, 401–402, 485).

increase unilaterally effected by respondent, the Union filed and served an unfair labor practice charge, alleging that respondent "has engaged in and is engaging in unfair labor practices" in that it refused to bargain collectively and had discharged four employees for union activities (R. 19–23). By letter dated July 13, the Regional Director for the Board's Sixteenth Region advised the Union that he was refusing to issue a complaint, on the ground that "it does not appear that there is sufficient evidence of violation to warrant further proceedings at this time" (R. 138, n. 2; 25). On or about July 31, the Union requested the General Counsel of the Board to review such refusal (R. 138, n. 2; 27). On January 24, 1955, subsequent to the unilateral wage increase of October 1954, and while the request for review was pending, the Regional Director advised the Union that "Upon reconsideration of the facts and circumstances, and additional evidence furnished us in connection with our investigation in the above matter, we have decided to withdraw our refusal to issue Complaint with respect to the 8(a)(5) allegation of refusal to bargain, dated July 13, 1954. We shall proceed with our investigation in due course" (R. 126; 80). On August 12, 1955, the General Counsel informed counsel for the Union as follows (R. 125–126; 82–83):

> With respect to the 8(a)(5) allegation of refusal to bargain, the Regional Director advised the parties by letter dated January 24, 1955, that he was withdrawing his dismissal of the 8(a)(5) portion of the charge and was continuing with the investigation thereof. All further inquiries with respect to the 8(a)(5)

allegation should be addressed to the Regional Director.

On August 17, the Regional Director issued the complaint herein, alleging that "On or about November 21, 1953 [six months prior to the filing of the charge], and at all times thereafter, respondent did refuse and continues to refuse to bargain collectively"; that "On or about October 7, 1954, respondent, without notice to the Union, put into effect a general wage increase"; and that by those acts "Respondent did engage in and is hereby engaging in an unfair labor practice," violative of Section 8(a)(5) of the Act (R. 85–89).

C. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of "all the relevant facts as shown by the record in this case," the Board, in agreement with the Trial Examiner (R. 167–177), found that respondent was not bargaining in good faith with the Union, thereby violating Section 8(a) (5) and (1) of the Act (R. 118–127). The Board observed that the general wage increase given by respondent "while negotiations were still continuing, and in complete disregard of the Union's representative status, provides the final insight into the respondent's conduct of negotiations with the Union" (R. 126). Accordingly, the Board concluded that "after November 21, 1953 * * * respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act" (R. 126).

In so holding, the Board (one member dissenting) held that the bargaining negotiations and the unilateral wage increase which occurred *after* the filing of the charge were properly within the scope of the complaint as the conduct involved was similar and closely related to that involved in the charge (R. 123–125, 134–135).

Accordingly, the Board ordered the Company to cease and desist from refusing to bargain; to refrain from interfering with the Union's efforts to bargain; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 127–129, 136–137).

II. THE HOLDING OF THE COURT BELOW

The court below, with one judge dissenting, set aside the order of the Board (R. 538–549). Judge Cameron, writing the opinion in chief, was of the view that the unilateral wage increase of October 1954 was not properly cognizable by the Board as it occurred after the filing and service of the charge (R. 543–548). In his view "* * * the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge" (R. 543). He also approved the view of the dissenting Board member that "but for the wage increase there would be no case whatever against the respondent" (R. 540, n. 5, see also R. 542–543). Chief Judge Hutcheson, concurring, agreed with Judge Cameron's holding that the unilateral wage increase was not to be taken into account by the Board (R. 548–549). Judge Hutcheson further agreed that, but for the unilateral increase, the record was devoid of any basis for the Board's finding that respondent had not bargained in good faith (R. 548).

Judge Rives, dissenting, was of the opinion that respondent had been guilty of a refusal to bargain within the six months preceding the charge, and that in any event the unilateral wage increase occurring after the charge was properly considered by the Board (R. 549–552). In his view, the holding of the majority that such post-charge conduct was not cognizable by the Board was "excessively technical and restrictive, and if sustained, * * * will seriously cripple the Board in any effective enforcement of the Act" (R. 551).

SUMMARY OF ARGUMENT

Under this Court's holding in the *National Licorice* case, 309 U.S. 350, 369, the Board was authorized to include in its complaint unfair labor practices "which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." The unilateral wage increases involved in this case fall within that rule, in that they were a further manifestation of the Company's refusal to bargain, which was the gravamen of the charge, and grew out of the Company's insistence during the course of the bargaining negotiations on the freedom to act unilaterally.

The 1947 amendments made no change in the rule of the *Licorice* case. All the considerations underlying that decision apply equally under the amended Act, and Congress evidenced no dissatisfaction with, or intention to change, the *Licorice* rule. The sole statutory change relating to charges was to preclude issuance of a complaint based upon charges filed and served over six months after the occurence of the unfair practices charged, but both the language and the legislative history of this provision show that it was designed to provide a period of limitations governing past violations, and not to alter the rule of the *Licorice* case relating to violations which are "of the same class * * * as those set up in the charge and were continuations of them in pursuance of the same objects." 309 U.S. at 369.

The case should be remanded with instructions to enforce the bargaining order in full. The evidence that respondent was not bargaining in good faith is more than ample to support the Board's finding. The contrary view expressed by the majority of the court below reflects a clear misapplication of the standard of judicial review declared by this Court and generally applied in other circuits.

ARGUMENT

THE BOARD'S COMPLAINT PROPERLY INCLUDED VIOLATIONS COMMITTED AFTER THE FILING OF THE CHARGE

The essence of the decision below is that the Board's complaint "must faithfully reflect the facts constituting the unfair labor practices as presented in the charge." While the court acknowledges that a complaint may enlarge upon the charge to include post-charge activity, it is evident that the permissible area of enlargement which the court has in mind is the mere "addition of details" which are in line with the general substance of the charge or are merely the "culmination" of the events covered by the charge (R. 545, N. 11, 547). In thus circumscribing the scope of the complaint, the court below, in our view, has failed to follow a controlling decision of this Court construing the statute, and has misconceived the separate functions served by the charge and the complaint.

In *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 357, 367–369, this Court dealt with a question substantially identical to that raised here, namely, "whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that [certain actions by the employer] involved unfair labor practices, since both occurred after the charge was lodged with the Board. * * *" 309 U.S. at 357. In that case the employer argued (Petitioner's brief in No. 272, October Term, 1939, pp. 20–24), precisely as does the court below, that the language of Section 10(b) authorizing the issuance of a complaint "stating the charges in that respect" means that "the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge" (R. 543). This Court, speaking through Mr. Justice Stone, unanimously rejected the contention, stating (309 U.S. at 369):

> It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices *which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.* The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of *the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects.* The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that "the Board was within its power in treating the whole sequence as one." [Emphasis added.]

In the instant case, as in *Licorice,* the post-charge violations (granting of wage increases without prior negotiations over them with the Union) were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." The charge alleged that the Company "has engaged in and is engaging in" an unfair labor practice in that it "refused to bargain collectively" (R. 20). The unilateral wage increase occurring after the filing of the charge was "of the same class of violations" and a "continuation" thereof in that it grew out of respondent's continued insistence on freedom to act unilaterally (*supra,* p. 5), and constituted a refusal to bargain violative of Section 8(a)(5). *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U.S. 217, 223–225; *May Dept. Stores* v. *National Labor Relations Board,* 326 U.S. 376, 385. As those cases establish, the employer's unlawful action in instituting a unilateral wage increase while negotiations were continuing could serve but to emphasize the claim advanced in the charge that the employer was not approaching the bargaining with the good faith required by the Act. Under the *Licorice* rule, therefore, the Board properly included the post-charge conduct in its complaint.

In confining the Board to the events alleged in the charge, the court below has misconceived the separate functions served by the charge and the complaint, respectively. Under the statute anyone may file a charge. It is not framed by lawyers with an appreciation of the legal significance of the details of conduct. On the contrary, a charge may be filed by laymen, not infrequently semiliterate workers, who may be only dimly aware that in some way their rights are being invaded. The charge "does not even serve the purpose of a pleading" but "merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U.S. 9, 18. To require a charging party to particularize each and every act constituting an unfair labor practice would place upon him the burden and expense of investigating and determining the full nature and scope of the employer's or the union's misconduct. Congress, however, has deliberately placed the latter responsibility upon the Board, a public agency vested by statute with the necessary investigatory machinery. Moreover, to require the details of the unfair labor practices to be specified in the charge would place upon the charging party the responsibility for framing the issues in the case, a matter which Congress left the Board to do in the complaint. *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.,* 122 F. 2d 433, 437 (C.A. 5); *Consumers Power Company* v. *National Labor Relations Board,* 113 F. 2d 38, 42 (C.A. 6); *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415–416 (C.A. 10).

If, as the court below stated, the complaint is to be confined to the exact limits of the claimed violations set forth in the charge, then the failure of the charging party to allege certain violations would preclude their development by the Board, and the statutory machinery would be restricted to a vehicle for the vindication of private, and not public rights. See *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 362, and authorities there cited; see also *Medo Photo Corp.* v. *National Labor Relations Board,* 321 U.S. 678, 687.

The 1947 amendments to the Act made no change in the rule of the *Licorice* case or with respect to the functions of a charge or complaint. As we have seen, the statutory language emphasized by the court below in attempted justification of its holding was in the original Act, and was unsuccessfully relied on by the employer in *Licorice.* The only change in the pertinent section (see p. 3, *supra*) was the addition of a proviso that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *." The 1947 amendment accordingly restricted the Board's power to probe events occurring more than six months *prior* to the filing and service of the charge. Both the language of the proviso and its legislative history show that it was designed only to provide a period of limitations governing past violations and to extinguish liability for unfair labor practices committed more than six months prior to the filing of the charge. It did not alter the rule of the *Licorice* case relating to subsequent violations.[4] "The six month limitation refers only to acts that occur before the charge and does not prohibit the inclusion of similar or related acts happening after the charge." *National Labor Relations Board* v. *Kohler Co.,* 220 F. 2d 3, 7–8 (C.A. 7); accord: *National Labor Relations Board* v. *Epstein,* 203 F. 2d 482, 485 (C.A. 3), certiorari denied, 347 U.S. 912, a case which, like that at bar, involved a post-charge unilateral wage increase.

Nothing in the amended Act suggests that Congress intended any drastic departure from the basic concept that the Board, once its jurisdiction is invoked, acts in the public interest, and, subject to the six months limitations period, its statutory responsibility to protect public rights is not limited by the contentions of the charging private party. On the contrary, the amended Act retains the provisions of the original Act which give the Board broad investigatory power (Section 11). It also retains the provision which permits the Board to amend its complaint at any time (Section 10(b)). The significance of these provisions would be seriously curtailed if the Board were restricted to the precise violations particularized in a charge.

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[4] S. Rept. No. 105, 80th Cong., 1st Sess., p. 26, 1 Legislative History, p. 432; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 53, 1 Leg. Hist. 557; 93 Cong. Rec. 4283.

The contention that the amended Act added a requirement that the complaint be limited to conduct detailed in the charge thus attributes to Congress a desire fundamentally to alter the purpose hitherto served by a charge and indeed to alter the whole concept of the Board's role. But the legislative history is devoid of any evidence that Congress intended so drastic an alteration of the function of the charge. On the contrary, the legislative history, replete though it is with reference to judicial decisions Congress was in a "mood" to modify (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 486–487), contains no criticism, indeed no mention, of the *Licorice* case or the rule there laid down, even though Congress in amending the Act expressly dealt with the subject of the charge. Hence, it may fairly be assumed that Congress, apart from intending that prompt notice of a pending investigation be furnished the prospective respondent by service of the charge, did not otherwise change the function of the charge, as recognized and described by the courts. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365–366; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114–115; *Brewster* v. *Gage*, 280 U.S. 327, 337.

It is urged, however, that one of the basic purposes of the amended Act in providing for the filing and service of charges within six months of the alleged unfair labor practices was to protect against the resurrection of stale charges long after the commission of the alleged illegal acts when relevant evidence and records might no longer be available to the alleged wrongdoer. This objective, the argument runs, is frustrated if the Board can enlarge upon the charge so as to include in a complaint, as here, matters occurring after the charge and 11 months prior to the issuance of the complaint. The argument overlooks the premise of the Board's position, namely that the complaint in enlarging upon the charge would be confined to such additional unfair labor practices as are related to, or grow out of, those alleged in the charge while the proceeding is pending before the Board. The charge would thus serve as notice to the alleged wrongdoer that his conduct with respect to the alleged unfair labor practices and related activity is under investigation by the Board. In this context the argument of stale charges and loss of evidentiary material loses most, if not all, its force. This is particularly true in the instant case. The charge filed here invoked the Board's investigatory powers with respect to respondent's negotiations and bargaining relationship with the Union. This relationship was a continuing one and covered the period both before and after the charges. It would be wholly artificial and out of keeping with the purpose of the statute to limit the Board's investigation to that segment of this continuing course of negotiations which took place before the filing of the charge. And by the same token, respondent could hardly have assumed with reason that the investigation would not extend to the entire course of negotiations with the Union.

As the dissenting judge in the court below correctly observed, the effect of that court's holding is to "seriously cripple the Board in any effective enforcement of the Act" (R. 551). In some cases, to be sure, the problem here presented can be averted by the timely filing of additional or amended charges. In many instances, however, this solution is impractical and administratively undesirable. Under the holding of the court below, each new bargaining conference, each new unlawful statement violative of Section 8(a)(1), or each picketing of a new neutral employer violative of Section 8(b)(4), must be followed by a new or amended charge, placing an unnecessary burden both on parties whose rights have been invaded and on the Board's administrative machinery designed to vindicate those rights. Moreover, the new matter contained in the charge may be uncovered by the Board in the course of its investigation, and the charging party may be unaware of it or of its legal significance. Once the Board has been apprised by a charge that a situation exists which warrants investigation and threatens industrial peace, the development of the case in is the hands of the Board, and not of private litigants, *Kansas Milling Co. v. Nationcl Labor Relations Board,* 185 F. 2d 413, 415 (C.A. 10). It is evident from the foregoing that there is no basis for the fears expressed by the court below that the position espoused here would "[leave] the Board and its agent *carte blanche* to expand the charge as they might please, or to ignore it altogether" (R. 544). As this Court has made clear, the Board would be confined in its complaint to the unfair labor practices set forth in a timely charge and those "which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board" (*National Licorice, supra,* 309 U.S. at 369).

This view of the statute is reflected in the holding of the Second Circuit, under the amended Act, that the Board must be given "wide leeway for prosecuting offenses unearthed by its investigating machinery, set in motion by the original charge,"[5] in the recognition by the Third and First Circuits that

> it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations,[6]

and in the observation of the Seventh Circuit[7] that "it is without significance that the complaint was broader than the original charge."[8]

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[5] *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 721 (C.A. 2), affirmed, 347 U.S. 17.

[6] *National Labor Relations Board* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C.A. 3); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 15–16 (C.A. 1).

[7] *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149.

Assuming that the Court finds that the decision below must be reversed, the question arises whether the appropriate disposition is to remand the case for further proceedings, or with instructions to enforce the Board's order. For the reasons indicated below, we submit that, in the circumstances of this case, the latter course should be followed.[9]

A majority of the court below (Hutcheson and Cameron, JJ.) has already indicated that, apart from the post-charge unilateral wage increase, it would set aside the Board's order as unsupported by the record. See opinion-in-chief, R. 540 (n. 5); concurring opinion, R. 548. The dissenting member of the court below (Rives, J.) was sharply of the other view, stating that "Without reference to subsequent events" the record of pre-charge conduct "furnishes substantial evidence to support the Board's finding that respondent refused to bargain in good faith" (R. 550). The issue thus posed as to the sufficiency of the Board's finding may properly be decided now by this Court. To remand the case with this issue unresolved would only delay further its ultimate disposition, and might well result in this Court's being asked to consider this case a second time.

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[8] Contrary to respondent's contention in its Brief in Opposition, pp. 16–18, the complaint here was properly authorized. The Regional Director's dismissal of the charge on July 13, 1954, was promptly appealed to the General Counsel. While the appeal was pending, the Regional Director advised the Union that he was reconsidering his dismissal of the charge on the bargaining issue and would proceed to investigate it further. Thereafter, on August 12, 1955, the General Counsel advised the Union that the bargaining charge was being investigated by the Regional Director, and the complaint issued five days later. Under these circumstances, even assuming *arguendo* that the Regional Director could not act while the matter was under review by the General Counsel, the review had been completed and the General Counsel had exercised his power to "direct the Regional Director to take further action" at the time the complaint issued. See 29 CFR, Sec. 101.6, 1949 Ed.

[9] The Board's view as to the proper disposition of the case was also expressly stated in the petition for certiorari, p. 17, n. 6.

The dissenting judge in the court below declared that "it is not even debatable that the Board's finding" of bad faith bargaining is supported by the record, and that "The proof, indeed, goes beyond any reasonable doubt" (R. 552). This unusually strong language reflects a strong record. Aside from the unilateral wage increase, the record shows that the employer (1) severely circumscribed the authority of his negotiators, and hence refused to bargain at all over bargainable matters;[10] (2) insisted on both a no-strike clause and the omission of any provision for arbitration;[11] (3) repeatedly refused to embody in an agreement existing practices of long standing;[12] (4) refused to make any binding agreement as to wage rates but insisted on freedom of unilateral action;[13] (5) reversed its own position during the course of the conferences to espouse proposals more stringent than those it had hitherto urged (*supra*, pp. 4, 5);[14] (6) refused to agree to any proposal for selecting a neutral arbitrator, insisted on the Union's being liable even for strikes it had not authorized, and repeatedly refused to furnish relevant data requested by the Union (Cf. *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9)). We respectfully submit that on this record the Board's finding of bad faith is amply supported, and that the holding below to the contrary reflects a "gross misapplication" of the standard of review laid down in *Universal Camera Corp.* v. *Na-*

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[10] Cf. *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 185 (C.A. 4), certiorari denied, 317 U.S. 652; *Wheatland Electric Coop. Inc.* v. *National Labor Relations Board*, 208 F. 2d 878, 880, 882 (C.A. 10), certiorari denied, 347 U.S. 966.

[11] Cf. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455; see also *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 282–283; *Local 1111* v. *Allen-Bradley Co.*, 255 Wis. 613, 617, 39 N.W. 2d 740, 742; *Boeing Airplane Co.* v. *Aeronautical Industrial Dist.*, 91 F. Supp. 596, 608 (W.D. Wash.), affirmed, 188 F. 2d 356 (C.A. 9), certiorari denied, 342

U.S. 821. As the arbitrator for the Ford Motor Company has stated (6 Labor Arbitration Reports 799, 801–802), "the whole purpose of a grievance procedure with a terminable step of arbitration is to substitute that method of adjustment for strikes, lockouts, and similar measures of self-help."

[12] Cf. *National Labor Relations Board* v. *Express Pub. Co.*, 111 F. 2d 588, 589 (C.A. 5), reversed on other grounds, 312 U.S. 426; *National Labor Relations Board* v. *Knoxville Pub. Co.*, 124 F. 2d 875, 883 (C.A. 6); *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C.A. 5).

[13] Cf. *National Labor Relations Board* v. *Berkley Machine Works & Foundry Co.*, 189 F. 2d 904, 907 (C.A. 4).

[14] *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. 2d 843, 845–846, 848 (C.A. 6), affirmed, 311 U.S. 514; *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 35 (C.A. 3); *Inland Lime & Stone Co.* v. *National Labor Relations Board*, 119 F. 2d 20 (C.A. 7); *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 705 (C.A. 4), certiorari denied, 340 U.S. 811.

tional Labor Relations Board, 340 U.S. 474, 490–491.[15] See the majority and dissenting opinion in *National Labor Relations Board* v. *Truitt Mfg. Co.,* 351 U.S. 149, 153–154, 155 and compare the standard of review adopted by the court below in this and other cases[16] with the standard enunciated by the First Circuit in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 205 F. 2d 131, 134, certiorari denied, 346 U.S. 887, and followed by other circuits.[17]

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[15] The Board's experience with the rule of review there laid down is reported in Cooper, *Administrative Law: The "Substantial Evidence" Rule,* 44 A.B.A. Journal (October 1958) 945, esp. at 948.

[16] *National Labor Relations Board* v. *I.B.S. Mfg. Co.,* 210 F. 2d 634, 639; *White* v. *National Labor Relations Board,* 255 F. 2d 564, 570–574.

[17] *National Labor Relations Board* v. *Century Cement Mfg. Co.,* 208 F. 2d 84, 85–86 (C.A. 2) and *Wheatland Electric Coop.* v. *National Labor Relations Board,* 208 F. 2d 878, 882 (C.A. 10).

CONCLUSION

For the reasons stated above the decision of the court below should be reversed, and the cause remanded with directions to enter an enforcement decree.

Respectfully submitted.

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